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THE COMMERCIAL LAW OF SCOTLAND.

A POPULAR HANDBOOK
OF
THE COMMERCIAL LAW
OF SCOTLAND.

BY
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SECOND EDITION.

EDINBURGH AND GLASGOW:
WILLIAM HODGE AND COMPANY.

1915.

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PRINTED BY
WILLIAM HODGE AND COMPANY
GLASGOW AND EDINBURGH
1915

First Edition, 1911

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P R E F A C E.

THE present edition preserves the original plan, but in re-writing the book most of the chapters have been amplified and a fuller reference has been made to leading cases. A chapter has been added on Arbitration. While the book is intended primarily for students, it is hoped that members of the legal profession may find its pages convenient for reference on many points likely to arise in everyday practice.

W. D. E.

ABERDEEN, *November*, 1915.

INTRODUCTORY NOTE.

THE law of Scotland (including that branch of it with which this handbook deals) consists partly of common law and partly of statute law. The common law arises from the customs of the people and includes the law merchant, which was the name given to the law founded on the usages of merchants and traders in different departments of trade. These usages and customs having been recognised and enforced by our Courts of law in the interests of traders and the public, have come to be adopted as part of the settled law of the land. Statute or statutory law, on the other hand, is law made by Act of Parliament, which may supersede any rule of common law.

ABBREVIATIONS.

A.C.	Appeal Cases (English Law Reports), 1875—
B. & Ald.	Barnewall & Alderson's King's Bench Reports, 5 Vols., 1817-22.
Bell's Ap.	Bell's House of Lords (Scots) Reports, 7 Vols., 1843-52.
Bell on Arbitration	John Montgomerie Bell on the Law of Arbitration in Scotland, 2nd Ed.
Bell's Princ.	Principles of the Law of Scotland by George Joseph Bell, 10th Ed., by William Guthrie.
Ch.D.	Chancery Division (Law Reports), 1875-90.
Ch. preceded by a year	Law Reports Chancery Division, 1891—
D.	Dunlop's Court of Session Reports (the 2nd Series), 24 Vols., 1838-62.
Ersk. Inst.	Erskine's Institute of the Law of Scotland, by J. B. Nicolson, 1871.
Ex. D.	Exchequer Division (Law Reports), 1875-80.
F.	Fraser's Court of Session Reports (the 5th Series), 1898-1906.
F. (H.L.)	Fraser's Reports House of Lords, 1898-1906.
H. and C.	Hurlston and Coltman's Exchequer Reports, 4 Vols., 1862-6.
M.	Morison's Dictionary of Decisions in the Court of Session, 27 Vols., 1532-1816.
M. (preceded by a numeral)	Macpherson's Court of Session Reports (the 3rd Series), 11 Vols., 1862-73.
O.H.	Outer House of Court of Session (indicating that decision is given by Lord Ordinary).
Q.B.	Law Reports, Queen's Bench Division.
R.	Rettie's Court of Session Reports (the 4th Series), 1873-98.
R. (H.L.)	Rettie's Reports (House of Lords), 1873-98.
S.	Shaw's Court of Session Reports (the 1st Series), 16 Vols., 1822-38.
S. App.	Shaw's House of Lords Reports, 2 Vols., 1821-4.
S.C.	Session Cases (Court of Session Reports), 1907—
S.C. (H.L.)	Session Cases (House of Lords Reports), 1907—
S.L.R.	Scottish Law Reporter, 1865—
S.L.T.	Scots Law Times Reports, 1893—
Sh.Ct.Rep.	Sheriff Court Reports, 1885—
Taunt.	Taunton's Common Plea Reports, 8 Vols., 1807-19.

CONTENTS.

	PAGE
PREFACE, - - - - -	5
INTRODUCTORY NOTE, - - - - -	7
ABBREVIATIONS, - - - - -	9
CHAPTER	
1-106 I. CONTRACTS, - - - - -	13
11-18 II. SALE OF GOODS, - - - - -	61
19-28 III. CARRIAGE, - - - - -	82
IV. MERCHANT SHIPPING, - - - - -	93
V. PATENTS AND DESIGNS, - - - - -	98
VI. TRADE MARKS AND TRADE NAMES, - - - - -	108
42-46 { VII. LIFE ASSURANCE, - - - - -	113
VIII. FIRE INSURANCE, - - - - -	117
IX. MARINE INSURANCE, - - - - -	124
47-54 X. BILLS OF EXCHANGE, CHEQUES AND NOTES, - - - - -	129
XI. BONDS, - - - - -	162
33-37 XII. CAUTIONARY OBLIGATIONS OR GUARANTEES, - - - - -	165
30-33 XIII. AGENCY, - - - - -	174
37-42 XIV. PARTNERSHIP, - - - - -	183
54-64 XV. COMPANIES, - - - - -	196
64-72 XVI. BANKRUPTCY, - - - - -	225
73-75 XVII. ARBITRATION, - - - - -	249
INDEX, - - - - -	259

THE COMMERCIAL LAW OF SCOTLAND.

CHAPTER I.

CONTRACTS.

I.—The Formation of a Contract.

DEFINITION.—A contract may be defined as an agreement which is intended to create a legal obligation. All contracts are agreements, but, strictly speaking, an agreement is not necessarily a contract. Two friends might agree to play golf on the morrow, but, if one of them fails to keep his promise, the other has no action at law against him. It is not an agreement which the law will enforce. There was no intention in such an agreement to create a legal obligation. Business, on the other hand, would be paralysed if men were not compelled to keep their promises and act up to their undertakings.

It requires two or more persons to make a contract. Between these persons there must be one intention, one mind, definite and clear agreement on every point. A contract may be of the simplest kind or of the greatest complexity. "I offer you £20 for this horse"; "done," constitutes a contract. On the other hand, a contract may consist of several pages of printed matter. However simple or complex the contract, the mind of all parties must be one and their intention identical. This is what lawyers call *consensus in idem*.

OFFER AND ACCEPTANCE.—It is by offer and acceptance that the parties communicate or declare their intention. The offer must be definite and the acceptance unqualified.

The acceptance must exactly meet the offer. To make a fresh condition in an acceptance is really to make a fresh offer, which again has to be accepted without qualification before a completed contract is formed. During a long correspondence both parties alternately become offerers until the agreement is finally concluded.

An offer is sometimes made by advertisement or circular addressed to the public, and may be accepted by any one who fulfils the conditions mentioned in it. Common examples are the advertisement of a reward offered for the capture of a criminal, or for finding a pet dog, or the time-table issued by a railway company. The following is an interesting advertising case:—The Carbolic Smoke Ball Company advertised that they would pay a reward of £100 to any person who contracted influenza after using one of their smoke balls according to printed directions supplied to all purchasers. A lady who purchased these balls, and duly conformed to the directions given, in spite of all took influenza. She accordingly sued the company for the £100, and was successful, on the ground that the advertisement was an offer to contract which she had accepted by the performance of the conditions contained in it (*Carlill v. Carbolic Smoke Ball Company*, 1893, 1 Q.B. 256).

MEANS OF COMMUNICATION AND DELAY IN TRANSMISSION.

—It is important to keep in view that, if the offerer specifies a particular mode of reply which the acceptor adopts, there is a valid contract. A wholesale dealer writes to a customer inquiring if he will buy a quantity of sugar at a certain figure, adding, "Please wire reply immediately on receipt of this letter." To clinch the bargain effectually, the customer must telegraph immediately on receipt of the letter. If he does so the seller is absolutely bound. If instead the customer writes in reply, the seller is not bound by his offer. To take an illustration—Lindsell wrote to Adams, "I will supply

you with 800 toddees of wether fleeces at a price of 35s. 6d. per todde, receiving your answer by return of post." Adams' address was, "Bromsgrove, Worcestershire," but the letter had been by mistake addressed, "Bromsgrove, Leicestershire." The letter ought to have reached Adams on 3rd September, but owing to the wrong address he did not get it till the 5th—two days later. Adams, as soon as he received it, wrote by return of post accepting the offer. Meantime Lindsell, not having heard from Adams, had sold the wool to another purchaser. Adams was successful in an action of damages against Lindsell for breach of contract (*Adams v. Lindsell*, 1818, 1 B. & Ald. 681).

As a general rule, the acceptor is not responsible for any delay in delivery of the acceptance, if he has posted it in the ordinary course of business. This is not very satisfactory for the offerer, but it has been so decided by the House of Lords in *Higgins v. Dunlop*, 1847, 9 D. 1407; affd. 1848, 6 Bell's Ap. 195. In that case a Liverpool firm received on 30th January a letter from a Glasgow firm offering a quantity of iron for sale at a certain price, and posted a letter of acceptance the same evening. This letter through delay in the post office did not reach the Glasgow firm till the afternoon of 1st February. The offerers refused to implement the bargain on the ground of undue delay in acceptance, but the acceptors were held not to be responsible for the delay, and were awarded damages for breach of contract.

In England it is held that the offerer is bound though the acceptance miscarried and never reached the offerer (*Household Fire Insurance Company v. Grant*, 1879, 4 Ex.D. 216). This decision was arrived at in England by overriding a previous decision. It has not been accepted in Scotland, and has been expressly disapproved of by an eminent Scotch judge (Lord Shand in *Mason v. Benhar Coal Company*, 1882, 9 R. at p. 890). But no general principle has been laid down in Scots law as to

how long an offerer is bound in the case of delay in transmission of a duly posted acceptance.

It is obvious that to avoid the risk of post office blunders (which fortunately are now so rare) and such clerical errors as in the case of *Adams v. Lindsell* above quoted, a safe course for the offerer to adopt is to calculate the ordinary time when an answer ought to reach him and say, "For reply here not later than Thursday, 30th curt., at 10 a.m.," or "For reply by wire not later than 12 noon to-morrow," or "For reply by return of post, subject to goods being unsold."

RECALL OF OFFER OR ACCEPTANCE.—As a general rule, an offer may be recalled any time before it has been accepted. There is an exception to this rule, where the offerer agrees to give the other party time to consider. If in offering goods he says, "I will give you three days to consider," he is bound to do so. But in England he is not so bound, and under English law he can withdraw his offer even before the three days are up. The reason is a technicality in English law—that this obligation to give time for deliberation, not being for consideration or value, does not bind the offerer. If, on the other hand, the other party had given to the offerer a consideration (say, 5s.) to allow the matter to lie over for three days, he would be barred even in England from withdrawing his offer within that time.

In other cases the power of recalling an offer subsists until actual acceptance, but actual acceptance, *i.e.*, a delivered acceptance, ends it. In contracts by post it has already been pointed out that, as a general rule, the mere posting of the acceptance is held to be equivalent to delivery. Thus, the offer cannot be recalled after the posting of the acceptance. That has been authoritatively decided in a number of cases. For instance in *Thomson v. James*, 1855, 18 D. 1, an offer of purchase was made by letter; a few days afterwards the seller posted an

acceptance, and on the same day the offerer posted a withdrawal of his offer, both letters being delivered the following day; a contract of sale was held to be completed and the withdrawal of the offer to be too late. As against the offerer, therefore, the acceptance is complete when it is put in course of transmission to him and is out of the power of the acceptor.

On the other hand, the opinion has been frequently expressed by text-writers in Scots law that an acceptor may recall his acceptance by a communication which reaches the offerer before or simultaneously with it. Thus, if a letter of acceptance is posted and a telegram revoking it is subsequently despatched, and is delivered to the offerer before the letter, the acceptance would, according to such a view, be effectually recalled. The authority quoted to support this view is the case of the *Countess of Dunmore v. Alexander*, 1830, 9 S. 190. The Countess wrote to Lady Agnew requesting her to engage on her behalf a servant named Alexander at wages previously mentioned. The next day, having changed her mind, she wrote to Lady Agnew that she did not require Alexander's services. Lady Agnew had posted a letter to Alexander engaging her, but immediately, on the receipt of the second letter from the Countess, she despatched it by express, and both letters were delivered simultaneously to Alexander. It was held that there had been no completed contract. It may be pointed out that the decision in *Dunmore v. Alexander* was given prior to the decision of the House of Lords in *Higgins v. Dunlop* above quoted, and seems at variance with the view therein expressed that a contract is completed by the despatch of the acceptance.

TIMEOUS ACCEPTANCE.—If a time for acceptance is prescribed by the offerer, an acceptance posted on the last day is in time. In *Jacobsen, Sons & Co. v. Underwood & Son*, 1894, 21 R. 654, an offer bearing "This for reply

by Monday, 6th inst.," was held to be accepted by a letter posted on Monday evening and reaching the offerer on Tuesday.

Where no time is fixed by the offerer, acceptance must be made within a reasonable time. What is a reasonable time depends upon circumstances. Where prices are subject to fluctuation, acceptance by return post may be necessary. Acceptance of a tender for mason work after eleven days has been held to be timeous (*Murray v. Rennie & Angus*, 1897, 24 R. 965); while delays of five weeks in accepting an offer to execute iron work and of thirty-nine days in accepting an offer to supply steam coal, during which periods the prices of the iron and the coal had risen considerably, have been deemed fatal, acceptance in both cases being held to be too late (*Wylie & Lochhead v. M'Elroy & Sons*, 1873, 1 R. 41, and *Glasgow, &c., Steam Fishing Company v. Watson*, 1873, 1 R. 189).

II.—Substance of a Contract.

1. VOID AND VOIDABLE.

Although apparently correct in point of form, there may be serious defects with regard to the substance of a contract. The parties may be legally incapable of consenting. There may be no real consent owing to ignorance, error, misrepresentation, or fraud. It may be impossible to perform the contract, or it may be illegal or immoral, and consequently unenforceable by law. Because of such defects a contract may be void or voidable. There is an important distinction between these two classes. A *void* contract is one which from the first has no legal effect whatever. A *voidable* contract takes full legal effect up to the time when it is set aside or challenged by some person who is entitled to challenge it. If a contract is void, no third party can acquire any rights in it as it never had any legal effect, but in a voidable

contract independent third parties may acquire rights before it is challenged.

2. CAPACITY TO CONTRACT.

To make a binding contract it is necessary that the parties should be legally capable of giving consent.

PUPILS.—A pupil, being a boy under fourteen or a girl under twelve, has no power to contract. A contract purporting to be made by a pupil is, as a rule, void. If, however, it is for the pupil's advantage (*in rem versum*), and he acts upon it, the other party is held bound to perform, and where necessities are sold to a pupil a reasonable price must be paid for them.

Contracts are made on behalf of pupils by their guardians or tutors. A father is the natural guardian or tutor of his pupil child; but if his acts are endangering the pupil's estate, or if he has an opposing interest, the Court will appoint a factor *loco tutoris* to take his place. The Guardianship of Infants Act, 1886, provides that, on the father's death, the mother, if surviving, shall be tutor or guardian either alone or jointly with any tutor appointed by the father. That Act also makes various provisions as to appointment of tutors by will of the father or mother and by the Court.

Contracts made on behalf of pupils by their tutors can be reduced during the *quadriennium utile*—the four years after attaining majority—on proof of lesion, *i.e.*, loss and injury (see *infra* under *Minors*).

MINORS.—A *minor* is a male above fourteen or female above twelve, who has not attained majority—the age of twenty-one. Minors have a limited capacity to contract.

The father during his life is a guardian or curator of his minor child, and he has the power to nominate curators to act after his death. If he fails to do so, the minor may

choose curators under the Act of 1555, c. 35, or a *curator bonis* may be appointed under the Pupils Protection Act, 1849.

If a minor has curators, the general rule is that all contracts made by him without their consent are null. To this rule there are the following exceptions:—(1) If a minor enters into a profession, trade, or business, the contracts made by him in the ordinary course thereof, and without the consent of his curators, are binding on him. There is a presumption that bonds, bills of exchange, and such documents granted by a minor engaged in business are granted for the purposes of the business. (2) If a minor holds himself out as of full age, so as to deceive parties with whom he deals, the contract is likewise binding on him. (3) Contracts to the minor's advantage are also valid without his curator's consent, and he must pay a reasonable price for necessities sold to him.

If a minor has no curators, he can himself enter into contracts. There is a doubt, however, as to how far a minor without curators can give a valid discharge, and recently the Court has drawn a distinction between capital and other sums in this matter. In *Jack v. North British Railway Company*, 1886, 14 R. 263, the Court held that a minor child could grant a valid discharge for a sum of £50 of damages as being of the nature of an alimentary payment and not a capital sum for investment. To grant a valid discharge of a capital sum, the appointment of a curator would appear to be necessary, and it is usual in such circumstances to obtain the appointment of a *curator bonis* in order that the discharge may be granted and the sum properly administered.

Contracts validly made by a minor with consent of his curators or by a minor himself, if he has no curators, can be reduced during the *quadriennium utile*, i.e., within four years of the attainment of majority, on the grounds of minority and lesion. The loss must not be trifling. It must be a positive loss of considerable amount. The

agreement must also be considered in view of the circumstances at the time it was made, and there can be no lesion to ground a reduction if it was a proper and reasonable agreement for the minor at its date. It is beside the question to consider whether the bargain has turned out well for the minor. The case of *Robertson v. Henderson & Sons, Limited*, 1905, 7 F. 776, clearly illustrates this principle in a workmen's compensation case, where a minor, with consent of his father and under legal advice, had discharged all claims against his employers on payment of a lump sum, and attempted unsuccessfully to reduce the discharge on the ground of minority and lesion. Cautionary obligations and donations would fall to be reduced on the ground of lesion. Lesion would also be presumed in a bond granted for borrowed money, which is reducible except so far as the lender is able to prove that the money had been applied for the benefit (*in rem versum*) of the minor.

When a contract is reduced on the ground of minority and lesion it is set aside from the beginning, and not from the date of the action. The minor cannot reduce the contract, unless he restores to the other party all benefit he has derived. The object of the reduction and restitution is to restore the cause and parties to the same position as before the contract.

Pupils and minors are specially protected against moneylenders by the Betting and Loans (Infants) Act, 1892, and the Moneylenders Act, 1900.

MARRIED WOMEN.—Formerly a woman's whole moveable estate, with the exception of *paraphernalia* (consisting of wearing apparel, personal ornaments, and the receptacles in which these are kept) passed to her husband on her marriage. Moveable estate, which was acquired during the subsistence of the marriage, also passed to the husband. The rents of heritage as they fell due were included in the estate thus falling to the husband. The

husband was said to take the wife's moveable estates in virtue of his *jus mariti*, and such estate became the absolute property of the husband. The husband's *jus mariti* might be renounced by an ante-nuptial marriage contract, *i.e.*, a contract executed by the husband and wife before marriage, or it might be excluded by the granter of property to the wife as regards such property. But if the *jus mariti* had not been so renounced or excluded, the husband, according to the common law, became proprietor of the whole moveable estate of the wife, and could deal with it as absolute owner. He also became liable for the wife's debts contracted before marriage. As will be seen later, the *jus mariti* has been well-nigh abolished by statute.

Besides the *jus mariti*, the husband has what is called the right of administration, *i.e.*, a right to control the management of the wife's estate. The right of administration puts the husband in the position of curator to his wife. Unless that right is renounced or excluded by deed or statute, the husband's consent is necessary to validate her deeds, and without his consent she cannot deal with her heritage or with moveables from which his *jus mariti* is excluded.

The husband's rights have been much curtailed by statute—

(1) Under the Conjugal Rights Amendment Act, 1861, where a wife has obtained a decree of judicial separation against her husband, or where a deserted wife has obtained a protection order, all property which the wife may acquire after such decree of judicial separation or protection order becomes her own property, from which the *jus mariti* and right of administration of the husband are excluded, and she may deal with it in every respect as if she were unmarried.

(2) The 1861 Act further provides that, where a married woman succeeds to property, or acquires right to it otherwise than by her own industry, it does not fall

under the *jus mariti* or right of administration, unless the husband makes a reasonable provision for her support and maintenance, if such a claim be made on her behalf.

(3) The Married Women's Property (Scotland) Act, 1877, excludes the *jus mariti* and right of administration of the husband from the wages and earnings of a married woman, in any employment, occupation, or trade in which she is engaged or in any business which she carries on under her own name, and from any money or property acquired by her through the exercise of any literary, artistic, or scientific skill. The earnings and property so acquired and all investments thereof are deemed to be settled to her sole and separate use, and her receipts are a good discharge. This Act also limits the liability of the husband for his wife's ante-nuptial debts to the value of the property which he has received through her.

(4) The Married Women's Property (Scotland) Act, 1881, provides that when a marriage is contracted after 18th July, 1881, and the husband is domiciled in Scotland at the time of the marriage, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, is her separate estate, and not subject to the *jus mariti*. The income of such estate is payable to the wife on her individual receipt. But she is not entitled to assign the prospective income of it, or, unless with the husband's consent, to dispose of such estate. The rents of her heritable property in Scotland are declared to be no longer subject to the *jus mariti* and right of administration of her husband. The 1881 Act, thus, in marriages after 18th July, 1881, abolishes the *jus mariti* entirely, and also abolishes the right of administration as regards the collection of income. The latter right remains, however, in regard to the disposal of heritage, and the capital of the moveable estate, and in deeds relating thereto the husband's consent is still necessary in virtue of it, unless such right has been expressly

renounced or excluded by deed. In marriages contracted before 18th July, 1881, the provisions of this Act do not apply where the husband has before that date by irrevocable deed made a reasonable provision for his wife in the event of her surviving him. In other cases the provisions only apply to estate acquired by the wife after 18th July, 1881. Persons married before 18th July, 1881, may come under the provisions of the Act by mutual deed duly registered and advertised. Where a wife is deserted by her husband, or is living apart from him with his consent, application may be made to the Court to dispense with the husband's consent to any deed relating to her estate.

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 The husband's rights are frequently renounced by antenuptial contract of marriage, and are almost invariably excluded when property is given or bequeathed to a married woman. When the wife has estate from which the *jus mariti* and right of administration are both excluded, she can, without her husband's consent, exercise all proprietary rights over it.

As a rule, a married woman cannot, even with her husband's consent, grant valid personal obligations, and this rule has not been altered by the 1881 Act. For example, she cannot grant bonds, bills, promissory notes, cautionary obligations, and guarantees. Such personal obligations by married women are null, and not enforceable against their estates or persons. To this rule there are certain exceptions, of which the following are the most important:—

(1) Under the Conjugal Rights Amendment Act, 1861, if a married woman has obtained a protection order or a decree of judicial separation against her husband, not only does all property which she may acquire belong to her, exclusive of her husband's *jus mariti* and right of administration as above mentioned, but she is capable of entering into obligations as if she were not married.

(2) A wife living apart from her husband with a

sufficient allowance paid to her by her husband, or with a separate estate of her own, although she holds no decree of separation or protection order, can grant a valid obligation for necessities supplied to her.

(3) When the husband is abroad, the wife can grant obligations for necessities supplied to herself and family, which will be as binding on her as if she were unmarried.

(4) If a wife carries on business on her own account when her husband is abroad, or when she is living apart from him, her personal obligations in connection therewith are valid.

(5) If a married woman holds estate free from the *jus mariti* and right of administration of her husband, her personal obligations incidental to the enjoyment and administration thereof will be good against her estate. For example, a married woman bought, with her husband's consent, shares of a bank out of funds exclusive of the *jus mariti* and right of administration of her husband. The shares were entered in the register in her name. In the liquidation of the bank it was held that she was not entitled to have her name removed from the list of contributories, on the ground that the obligations incurred by her in the enjoyment and administration of her separate estate were binding on her (*Biggart v. City of Glasgow Bank*, 1879, 6 R. 470). See also *Laing v. Provincial Homes Investment Company*, 1909, S.C. 812.

(6) Contracts entered into with the intention of benefiting her separate estate (*in rem versum*) are binding on a married woman, e.g., a debt incurred by her in improving her property.

(7) If the husband is in prison, it is thought that his wife can contract as if unmarried.

(8) If a married woman holds herself out as unmarried, and so induces a person to enter into a contract with her, she is bound to implement the contract.

(9) A married woman granting an obligation *ad factum*

præstandum (to perform a certain act) is, as a rule, bound to implement it.

A married woman is held to be the appointed agent for her husband in ordinary domestic affairs—*præposita negotiis domesticis*; as such she may order goods proper for the family, for the price of which the husband alone is liable.

INSANE PERSONS.—If a person has been legally declared to be insane, and has been put under restraint, he has no opportunity of attempting to make a contract. The Court on application appoints a *curator bonis* to manage his affairs. But many a man, whose mind is unhinged, may neither have been legally declared insane nor committed to an asylum. A contract made by such a man is good or bad according to circumstances. The questions to be asked are—"Was he insane at the time the contract was made?" "Did the other party know or have reason to suspect that he was not in his right mind?" During lucid intervals he has full capacity to contract, and he may also confirm and ratify any contract made by him while insane. It is thought that the contract of an insane person is voidable, and not absolutely void. To reduce such a contract it is sufficient to prove that the person is incapable of understanding the transaction or suffers from delusion in connection with the subject-matter of the contract. On the other hand, in the case of an idiot, there being either no development or very defective development of the mental faculties, a contract made by him is null and void. An idiot is in the same position as a pupil, and is incapable of entering into a contract. A reasonable price must be paid for necessaries sold and delivered to a person who by reason of mental incapacity is incompetent to contract (*Sale of Goods Act, 1893, section 2*).

INTOXICATED PERSONS.—If a person is in such a state of intoxication as not to understand the effect of the contract

he is making, he is in the same position as an insane person. If the other party knew or had reason to suspect his condition, the contract is voidable. When the intoxicated person becomes sober, he may reject or accept it. If he wishes to repudiate the contract, it is essential that he should do so the moment his senses return and he knows what he has done. The leading case on this subject is *Pollok v. Burns*, 1875, 2 R. 497.

Partial drunkenness is not usually sufficient to invalidate a contract, unless there has been circumvention or fraud. A person who through drunkenness is incapable of contracting must pay a reasonable price for necessities sold and delivered to him (Sale of Goods Act, 1893, section 2). A bargain made during a drunken frolic under circumstances showing lack of serious intention is not binding.

3. EFFECT OF ERROR, MISREPRESENTATION, FRAUD, FACILITY AND CIRCUMVENTION, UNDUE INFLUENCE, FORCE AND FEAR.

We have been considering the cases where a valid consent cannot be given owing to the incapacity of the parties. Let us now consider the cases where consent is marred under the influence of (1) error, (2) misrepresentation, (3) fraud, (4) facility and circumvention, (5) undue influence, (6) force and fear.

ERROR.—The Court will not interfere in the case of a small error. It must be substantial—in *substantialibus*, i.e., in regard to the essentials of the contract, and not merely in regard to some incidental matter. The essentials of a contract into which error may enter and so invalidate consent have been held to be (1) its subject-matter, (2) the persons contracting, (3) the consideration, (4) the quality of the thing engaged for, (5) the nature of the contract supposed to be entered into (*Stewart v.*

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Kennedy, 1890, 17 R. (H.L.) 26, per Lord Watson). *E.g.*, where a shipper had entered into an arrangement for the charter of his ship at the date when, unknown to both parties, the ship had been lost, the contract was held to be void on the ground of essential error with regard to the subject-matter of the contract.

Essential error occurs in the case of an ambiguous contract, that is, where the ambiguity will support two constructions, and the one party employs one meaning and the other party the other meaning. Of course, both constructions must be well founded. If the words of a contract have a recognised legal meaning a party cannot attempt to reduce it on the plea that he meant something else. The following is a remarkable instance of an ambiguous contract, where the parties were at cross purposes:—A sold to B 125 bales of cotton to arrive by ship “Peerless” from Bombay. It so happened that there were two ships of that name sailing from Bombay, one in October and the other in December, and B meant the former, while A meant the latter. The two vessels carried different qualities of cotton. The contract was accordingly held void (*Raffles v. Wichelhaus*, 1864, 2 H. and C. 906).

To reduce a contract on the ground of error alone the error must be mutual, *i.e.*, common to both parties. If the error is only on one side the contract can only be reduced by showing that the error has been induced by the representations, innocent or fraudulent, of the other party. Mutual error as to the essentials of a contract renders it void.

As a general rule, a contract will not be set aside because of an error in law. The most important qualification of this doctrine is the case of discharges granted in ignorance of legal rights. Such discharges, however, will not be set aside if they have been granted for value and under legal advice.

MISREPRESENTATION. — Innocent misrepresentations made by a third party have no effect. They must be made by the other contracting party or his agent in the course of the negotiations, and must refer to the subject-matter of the contract. It is not a sufficient answer in an action at the instance of the injured party to state that the representations were made in good faith. For example, A was successful in reducing an agreement to enter into partnership on the ground that he had been induced by B, the owner of the business, to enter into the agreement by erroneous statements made by B as to the profits made from the business. There was no fraud proved in this case, and B seems merely, in his anxiety to obtain capital, to have taken up and expressed a too sanguine view without testing it, and thus to have made a misrepresentation on which the other party relied as true, and without which there would have been no contract (*Farquharson v. Wilson*, 6 R. 779).

In the recent case of *Duncan Galloway & Co. v. Duncan Falconer & Co.*, 1913, S.C. 265, a firm of quarrymasters, in disposing of their business and their interest in the lease of a quarry, sold certain sheds and houses "in so far as belonging to" the sellers. Six years after the sale, at the expiry of the lease, the purchasers found that they had paid for buildings to the value of £360 which belonged to the landlord. The sellers had believed and had represented to the purchasers that these buildings were their property, and they had been valued by a valuator and paid for accordingly. The error was induced by the innocent misrepresentations of the sellers, who were held liable to repay to the purchasers the £360 thus paid in error with interest at 3 per cent. from the date of payment.

As a rule, non-disclosure of a fact does not amount to misrepresentation. But in the following cases there is a duty to disclose material facts, viz.:—(a) When the parties are in a fiduciary relationship, such as agent and

client, or trustee and beneficiary; (b) in contracts *uberrimæ fidei*, e.g., contracts of marine, fire and life insurance, and fidelity guarantees.

A contract induced by innocent misrepresentations is usually voidable, but if the misrepresentations have induced essential error as to the subject-matter or nature of the contract, or as to the persons contracting, it is void. In certain circumstances, as in the case last quoted, the proper remedy is for recovery of money paid in error.

FRAUD.—Fraud is another ground on which a contract may be invalidated. Fraud has been defined as “a false representation of fact made with a knowledge of its falseness or in reckless disregard if it be true or false, with the intention that it should be acted upon, and actually inducing the other party to the contract to act upon it” (Lord Herschell in *Derry v. Peek*, 1889, 14 A.C. at p. 374). Observe that the fraudulent statement must be one of fact. This excludes an expression of opinion as to the prospects of an undertaking. The party who makes the statement must either know it to be false or must be reckless whether it be true or false. Further, the falsehood must have been the cause of the contract being entered into.

Misrepresentation of intention is held to be equivalent to a fraudulent misstatement of fact. Thus, where directors raised money on the expressed intention of developing the business of the company, and it was proved that their real intention was to pay off the pressing debts of the company, it was held that they had knowingly made a false statement of fact (*Edgington v. Fitzmaurice*, 1885, 29 Ch.D. 459). To buy goods with the intention of not paying for them is fraud.

Fraud usually renders the contract voidable. If it causes error in the essentials of the contract it renders the contract void. It is usually open to the injured party either to repudiate the contract or to take an action

of damages for the loss sustained. The fraud of a third party also gives rise to an action of damages against him.

FACILITY AND CIRCUMVENTION.—Where one party is weak and facile and easily imposed upon and the other party takes advantage of this weakness and facility to get him to enter into a contract to his prejudice, the contract may be set aside. Circumvention and fraud are just two shades of the same thing. A contract thus induced is voidable. In *M'Neill v. Moir*, 1824, 2 S. App. 206, a deed was reduced which had been obtained from an aged and facile person, whereby he discharged a debt of £3000, heritably secured, for a bill of £230 and an annuity of $7\frac{1}{2}$ per cent. during his life, for payment of which no security was granted.

UNDUE INFLUENCE.—If the relationship between parties creates a dominant or ascendant influence, as between agent and client or parent and child, and such influence is used unduly, the contract is voidable. In *Anstruther v. Wilkie*, 1856, 18 D. 405, an obligation by a client to his agent for a sum of money as a gift in addition to the ordinary business charges; and in *Carmichael v. Baird*, 1899 (O.H.), 6 S.L.T. 369, two gratuitous deeds by a son executed on his attaining majority in favour of his mother and her second husband, were set aside on this ground.

FORCE AND FEAR.—When a person is induced by violence to enter into a contract, the contract is void. In an old case (*Earl of Orkney v. Vinfra*, 1606, M. 16,481) “the Earl of Orkney summoned Vinfra into his presence, and with terrible countenance and words, and laying his hand upon his whinger (dirk) he threatened with execrable oaths to relieve Vinfra of his life and stick him presently through the head with his whinger if he signed not” an obligation in the Earl’s favour. Vinfra signed, but afterwards refused payment. “The lords

found the exception of fear very relevant and sufficiently qualified." To take a modern instance, M'Intosh, who had been illegally imprisoned by Chalmers, while in prison granted a letter of indemnity, by which he undertook not to sue Chalmers for damages for wrongful imprisonment. The Court reduced the letter of indemnity on the ground that it had been obtained by means of force and fear (*M'Intosh v. Chalmers*, 1883, 11 R. 8).

4. ILLEGAL AND IMMORAL CONTRACTS.

CONTRACTS ILLEGAL BY STATUTE.—If the terms of a contract are expressly prohibited by a statute it cannot be enforced. Take the following instances:—

By a statute passed in 1594 no member of the College of Justice or any inferior Court may buy heritage while it is the subject of a depending lawsuit. It is unlawful for an advocate or law agent to bargain to accept a share of the subject in dispute in payment of his professional charges. Such a bargain is called a *pactum de quota litis*, and is illegal.

The Act 49 Geo. III. c. 126 extended to Scotland the provisions of the English Act 5 & 6 Edw. VI. c. 16 against buying and selling public offices. All bargains, sales, promises, bonds, agreements, and assurances in connection with offices in the gift of the Crown are void.

By the Tippling Act, 1750, 24 Geo. II. cap. 40, no one can sue for the price of spirits unless 20s. worth has been bought at one time and the liquor has been delivered in quantities not less than a reputed quart at once.

Sales by lottery and contracts regarding lotteries are by statute unlawful.

The Truck Acts, 1830-1896, prohibit employers in certain trades from paying wages otherwise than in the current coin of the realm. There used to be a practice on the part of many employers to keep stores, and to

pay their workmen, not in money, but in goods from the stores. Such an arrangement was liable to abuse, the employer often keeping articles of bad quality and selling at high prices, and thus making a large profit.

The name and residence of the printer are required by statute, under large penalties, on the first or last leaf of each book or paper printed by him; and, unless this is attended to, the printer cannot sue for the price of the printing.

No one without some insurable interest can take out an insurance policy, whether a life, fire, or marine insurance policy. These prohibitions were made by statute to prevent abuses on the part of unscrupulous persons effecting insurances where they had no legitimate interest to do so. We shall deal with this subject later in treating of the contract of insurance.

It is enacted by statute that no one can recover charges for medical or surgical attendance or advice unless he is registered as a medical practitioner. There are similar statutory restrictions with regard to chemists, dentists, and veterinary surgeons.

Also, no one can recover any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken in the capacity of a law agent, unless he is at the time a duly certificated law agent.

The Moneylenders Act, 1900, provides that in proceedings by or against a moneylender in respect of a loan, the Court, if satisfied that the interest or any other charges are excessive, and that the transaction is harsh and unconscionable, may re-open the transaction and relieve the borrower from payment of any sum in excess of what the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable. Further, a person cannot carry on business as a professional moneylender unless his name and address are duly registered, and a registered moneylender can do business only in his registered name

and at his registered address. If he does not comply with these requirements, he is liable to fine or imprisonment or both, and any contracts so made are illegal and void, so that he cannot even recover the money lent. *Bona fide* holders of securities under, or assignees of, such contracts are protected by the Moneylenders Act, 1911.

CONTRACTS VOID AT COMMON LAW.—All contracts that are an incentive or encouragement to crime or illicit relations of any kind, or that are made for indecent or mischievous purposes or considerations, are void.

The Court will not enforce wagers. A person may win a bet on the result of an impending Parliamentary election, but if the loser refuses to pay, the Court will not assist him to recover the amount.

Contracts inconsistent with public policy are void, of which the following are examples:—(1) Contracts against the policy of the domestic relations, *e.g.*, contracts in restraint of marriage, are invalid, and what are called marriage brocage bonds, stipulating for a commission for influence used in bringing about a marriage, are also invalid, and cannot be enforced in a Court of law.

(2) Contracts which would disturb public arrangements or impede the course of justice, *e.g.*, contracts for preventing witnesses from giving evidence or for compromising a prosecution of public concern, or for preventing a bankrupt from fully disclosing his affairs, are void.

(3) Contracts for defeating the Revenue laws are void, and cannot be enforced. This covers contracts in connection with smuggled goods. Suppose A agrees with a friend B, who is going to the Continent, that, if B will smuggle in some cigars for him, he will pay him what he gives for them and a little commission to himself. If B succeeds in getting the cigars through without detection, but A declines to take them, he cannot apply to the Court for redress and compel A to keep his bargain. Suppose A even goes the length of taking the cigars, but

afterwards refuses to pay for them, B will have no redress.

(4) Contracts inconsistent with the national war policy are void. The subjects of countries at war cannot lawfully trade with each other. In contracts which exist at the time of war the payment of a debt or performance of the contract is suspended during hostilities. The recent statutory provisions on this subject are contained in the Trading with the Enemy Act, 1914, and the Trading with the Enemy Amendment Act, 1914. These Acts provide penalties for trading and attempting to trade with the enemy during the present war, and make provision for preventing the payment of money to enemies and for preserving property belonging to enemies with a view to arrangements to be made at the conclusion of peace.

(5) Contracts in restraint of the liberty of the person, if absolute and unqualified, are void. In this connection we shall deal with contracts in restraint of trade.

CONTRACTS IN RESTRAINT OF TRADE.—As a rule, every one in this country is allowed the utmost freedom with regard to carrying on any particular trade or occupation, and the law will even protect a man against his own voluntary act if he has thereby unduly fettered himself.

Contracts in restraint of trade arise in such circumstances as the following:—If A, a draper, engages B to manage a branch shop, it is a very common stipulation in the contract setting forth the conditions that, when B leaves A's service, he will not set up as a draper or enter into the employment of any other draper within a radius of 1 mile from A's branch shop. The reason for such a stipulation is, of course, obvious. B has an opportunity of getting to know the customers. If he left A's service and started a draper's shop next door he might take away all the customers.

Such stipulations are often made in partnership agree-

ments also. So, in the transfer of an established business, the most valuable part of it is often the connection, and the seller is, as a rule, bound not to start a similar business within a certain distance.

What is the legal effect of such stipulations? The answer is, that if the law considers them too strict they are void and have no effect, but, if in the eye of the law they are reasonable in the circumstances, they are valid and will be enforced. It is a question of circumstances. What in one case would be most unreasonable is perfectly reasonable in another case. The restraint must be only a fair and reasonable protection to the interests of the party in whose favour it is made, and not such as to interfere with the interests of the public. For instance, in the case of the draper already mentioned, the master could not claim more than would protect him from probable competition from his manager. To prevent him from starting business within 1 mile of the shop was perfectly reasonable, but, if the contract had stipulated that B should not start business within a radius of 100 miles, it would be manifestly unreasonable.

The following restrictions have all been held by Courts of law to be reasonable:—By a butcher, who sold his premises and goodwill of the business, not to carry on the trade of a butcher within 5 miles of the old shop; by a chemist's assistant, not to carry on business within 1 mile of his master's shop; by a general merchant in a country place, who sold his business, not to carry on that kind of trade within a whole section of the county of Cornwall; by a surgeon's assistant, not to practise on his own account within 10 miles of the place where the surgeon lived; by a doctor to discontinue practice in a particular district, involving resignation of post of medical officer to local authorities (*Ballachulish Slate Quarries Company v. Grant*, 1903, 5 F. 1105).

The greater the radius of probable customers the wider may be the prohibited area.

An agreement by a horsehair manufacturer not to carry on a similar business after the dissolution of the firm within a radius of 200 miles from Birmingham was held to be binding. A commercial traveller in the lace trade, who travelled over a large district in England, was held bound by an agreement to the effect that on the termination of his service he would not travel in the same trade "over any part of the same ground." An obligation by a glazier not to carry on his business anywhere in Scotland was held binding (*Meikle v. Meikle*, 1895, 33 S.L.R. 362).

The leading case on this subject is *Nordenfeldt v. Maxim-Nordenfeldt Guns Company*, 1894, A.C. 535, decided in the House of Lords. Nordenfeldt was a patentee and manufacturer of guns and ammunition. He sold his patents and business to a company, and agreed he would not for twenty-five years engage, except on behalf of the company, in the business of a manufacturer of guns or ammunition. The contract was unrestricted as to space, yet the Court held that, having regard to the nature of the business and the limited number of customers, viz., the Governments of this and other countries, it was not wider than was necessary for the protection of the company nor injurious to the public interests of this country, and that it was therefore valid.

Now, what sort of restriction is held to be unreasonable? A contract not to carry on trade at all is quite invalid. Farther, any contract not to carry on a business is void, if it is more than sufficient to protect the person to whom the undertaking is given.

The following are examples of unenforceable restrictions:—

An obligation by a commercial traveller not to sell or travel in any of the towns or districts traded in by his employer for a period of twelve months from the termination of his engagement was held to be unreasonable and invalid, both because the area within which it took him

bound not to travel was unnecessarily wide, and also because it took him bound not to travel in any trade whatsoever (*Mulvein v. Murray*, 1908, S.C. 528).

Where local carriers in disposing of their business to a company bound themselves not to carry on any separate business of a similar kind in the United Kingdom for a period of ten years at least, it was held that the restraint operating over so wide an area was greatly more than necessary for the company's protection, and therefore could not be sustained (*Dumbarton Steamboat Company, Limited v. Macfarlane*, 1899, 1 F. 993).

In *Mason v. Provident Clothing Company*, 1913, A.C. 724, the House of Lords decided that, where a canvasser to a clothing and supply company, who carried on business on check and credit system, undertook that he would not for three years after leaving his employment enter into the service of any person carrying on a similar business within 25 miles of London, the restriction was wider than was reasonably necessary for the protection of the company, and that the undertaking was therefore unenforceable.

III.—Formalities and Evidence of Contracts.

PAROLE AND WRITTEN EVIDENCE.—Many mercantile contracts may be constituted without writing of any kind, and may be proved by witnesses, such as sale, barter, hiring of moveables, agency, and partnership. It is competent to prove these contracts by parole evidence, *i.e.*, by word of mouth. Such contracts may also be proved partly by writing and partly by parole evidence; *e.g.*, where there is a written offer and a verbal acceptance. Writing in many cases, although not an indispensable formality, is a wise precaution, in order to preserve evidence of the bargain. To remove doubts and leave no ambiguity, it is important in complicated contracts to set forth the details of an agreement in writing.

Some contracts can neither be constituted nor proved without writing. These include contracts relating to land; contracts which the parties have agreed to put in writing; and contracts of service for more than a year. A contract of apprenticeship for any period is not binding unless constituted by writing (*Grant v. Ramage & Ferguson*, 1897, 25 R. 35). Where writing is essential to the constitution of a bargain, it is called a *literarum obligatio*.

In other cases writing is only necessary as evidence of the contract, *i.e.*, to prove the bargain which may have been constituted verbally. The absence of writing may be supplied by a reference to the oath of the debtor. Such contracts include cautionary obligations or guarantees; loans of money exceeding £100 Scots (*i.e.*, £8 6s. 8d.); gratuitous promises even where the amount is less than £100 Scots; and contracts of marine insurance. Bills of exchange and promissory notes must be in writing, and the acceptance of a bill must also be in writing. The Merchant Shipping Act, 1894, by section 17, provides that a contract for the hire of seamen for all ships above 80 tons must be in writing in the form issued by the Board of Trade, otherwise it is not proveable in favour of the masters or owners.

In considering the value of writing as evidence it is important to notice that deeds and other documents are of two kinds, namely, probative and improbative.

PROBATIVE WRITINGS.—A *probative* writing proves its own contents without further evidence. It contains within itself sufficient evidence of the agreement of parties, and warrants a Court of law in enforcing the obligations therein set forth without requiring any other evidence.

The probative writ of an agent duly authorised is as effectual as that of the principal (*Whyte v. Lee*; 1879, 6 R. 699).

There are three classes of probative writings, namely, *attested*, *holograph*, and *privileged*.

Attested writings are the most formal, and require the following legal solemnities:—

1. The party to be bound subscribes every page (or, at least, one page of each sheet and at the end of the document).

2. *Two* witnesses sign on the last page, although some deeds, *e.g.*, the memorandum of association and the articles of association of a company registered under the Companies Acts, and a bill of sale of a ship, are valid if signed before *one* witness only.

The witnesses must be fourteen years of age, and must either see the party sign or hear him acknowledge his signature.

3. The designations of the witnesses are set forth in the testing clause or appended to their signatures. The testing clause is the last clause of the deed added after the deed is executed, containing the details regarding its execution. A form of testing clause is as follows:—

In Witness Whereof these presents are subscribed by me at Edinburgh on the Twenty-third day of September, Nineteen hundred and ten, before these witnesses C D and E F (design them fully).

(Signed) A B.

C D, *Witness*.

E F, *Witness*.

With regard to any company registered under the Companies Acts, it is provided by the Conveyancing (Scotland) Act, 1874, section 56, that a deed to which the company is a party is validly executed if it is sealed with the common seal of the company and subscribed on behalf of the company by two directors and the secretary, and such subscription is binding and effectual, whether attested by witnesses or not.

All alterations in the document must, of course, be duly authenticated.

Before 1874 the essentials of an attested writing were more numerous, but these were diminished by the Conveyancing Act of 1874. Section 38 of that Act made it no longer necessary to name and design the writer or printer of the deed or to specify the number of pages, and provided that the names and designations of the witnesses may be appended to or follow their subscriptions, instead of being mentioned in the body of the deed or in the testing clause; the designations may be so added at any time before the deed is recorded in any register for preservation or founded on in any Court, and need not be written by the witnesses themselves.

By section 39 of the Act it is also provided that a writ subscribed by the granter and bearing to be attested by two witnesses subscribing, is not to be deemed invalid or denied effect according to its legal import because of any informality of execution; but the burden of proving that it was so subscribed by the granter and the witnesses lies on the party using or upholding it. Under this section writs have been upheld where the granter and witnesses signed on the last page only (*M'Laren v. Menzies*, 1876, 3 R. 1151); where subscribing witnesses were not designed (*Thomson's Trustees v. Easson*, 1878, 6 R. 141); where a witness subscribed after the granter's death (*Tener's Trustees v. Tener's Trustees*, 1879, 6 R. 1111); and where there was a mistake in the name of a witness in the testing clause, the name "Robertson" being inserted therein instead of "Roberton," as the signature bore (*Richardson's Trustees*, 1891, 18 R. 1131).

If the party is unable to write, a notary public or justice of the peace may sign the document for him, but the deed must be read over to the granter and his authority obtained in presence of two witnesses. The notary or justice must sign the deed in the presence of the granter and the witnesses. A docquet setting forth these facts

is written on the deed by the notary or justice with his own hand and subscribed by him and the witnesses. (See Conveyancing Act, 1874, section 41.) The following is an example of the notarial docquet (see Schedule I. of the Act):—

“By authority of the above-named and designed A B, who declares that he cannot write on account of sickness and bodily weakness [*or*, never having been taught, *or* otherwise as the case may be], I, C D (*design him*), notary public, subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before-named and designed, who subscribe this docquet in testimony of their having heard [*or* seen] authority given to me as aforesaid, and heard these presents read over to the said A B.

(Signed) C D,
Notary Public.”

E F, *Witness*.

G H, *Witness*.

A *holograph* document is wholly or in essential parts written by the granter in his own handwriting and subscribed by him. It does not require to be attested by witnesses. A letter written and signed by a partner of a firm in the firm's name is deemed holograph of the firm. Writings holograph of an authorised agent are as binding as writings holograph of the principal. A writing may be adopted as holograph by a statement to that effect. For example, where a party adds the words, “adopted as holograph,” before his signature, the effect is to make the document holograph. If the writ does not contain a statement that it is holograph, this must be proved by any one founding on it.

Privileged writings are probative, although they are neither attested nor holograph. They are valid if merely

subscribed. They include all writings relative to mercantile matters—*in re mercatoria*. Bills, notes, and cheques, orders for goods, mandates, mercantile guarantees, receipts for money or goods, docquetted accounts, and in general all the variety of letters and documents required in trade fall under this rule. The necessity and expediency of these privileges in trade are apparent. Business could not be carried on if cumbrous solemnities had to be observed in each transaction. Receipts for rent are also privileged, and require only the subscription of the landlord or his factor.

IMPROBATIVE WRITINGS.—An *improbative* writing is not in itself sufficient evidence of the transaction to which it refers. Other evidence is required before any assistance can be obtained from a Court of law.

STAMP DUTY.—Certain deeds or writings require to be stamped. The Stamp Act, 1891, principally regulates the matter. Stamp duties must, as a rule, be denoted by impressed stamps. But adhesive stamps may be used in certain cases, *e.g.*, for an agreement liable to the duty of 6d., a bill of exchange *payable on demand*, a receipt of £2 and upwards, a contract note, a charter party, a proxy and voting paper. Adhesive stamps must be cancelled by writing name or initials over the stamp with the date, or otherwise rendering them incapable of being used for any postal or other purpose, under a penalty of £10.

If an agreement is contained in separate letters, only one of the letters requires to be stamped.

The principal documents which are exempted from stamp duty are transfers of shares of Government stocks; deeds relating to the transfer of ships; wills and testamentary writings; deeds under the Bankruptcy Acts; agreements where the subject-matter is under £5 of value; agreements for the hire of a labourer, artificer, manufac-

turer, or menial servant; agreements or letters relating to the sale of any goods, wares, or merchandise.

Some documents, such as inland bills and promissory notes, cannot be stamped after execution. Receipts can be stamped within fourteen days under a penalty of £5, and after fourteen days and within a month, under a penalty of £10; charter parties within seven days after first execution, penalty 4s. 6d.; after seven days and within a month, penalty £10. Most deeds can be stamped after execution on payment of the unpaid duty and a penalty of £10; while instruments, such as conveyances on sales, leases, bonds, mortgages, which are chargeable with an *ad valorem* stamp duty, may be stamped without a penalty within thirty days after first execution or after being received in the United Kingdom if executed abroad.

In executing a contract it is of the utmost importance to observe that it is stamped with a stamp of the proper denomination and amount. Unless a document is duly stamped, it cannot be given in evidence or be available for any purpose whatever (1891 Act, section 4 (4)). If it is a document, which may legally be stamped after execution, it may only be produced as evidence in Court on payment of the unpaid duty, the penalty for after stamping, and a further sum of £1 (section 4 (1)).

DELIVERY OF CONTRACTS.—Mutual contracts in writing are complete when signed by all the parties. In the case of unilateral contracts, that is, contracts which are signed only by one party, delivery is required for completion. Thus, a bond for the loan of money which is signed by the borrower only, and a policy of insurance which only has the signature of the insurance company, are not binding until they have been delivered to the lender and the insured respectively.

An agent is presumed to hold for his principal. If, therefore, a deed is in the possession of the agent of the granter, it is not delivered; but if it is in the hands of

the grantee's agent delivery is presumed. Such a presumption may, however, be rebutted by contrary evidence. Where an agent acts for both parties, the presumption of delivery varies according to the nature of the transaction and the circumstances. In *Main v. Thomson's Trustees*, 1850, 12 D. 748, a deed was held to be partly delivered and partly undelivered in the following circumstances:—An agent, acting for both parties, arranged a loan of £900 over heritable property. He received the £900 from the lender and obtained a bond for it from the borrower, but only paid £669 of the loan over to the borrower. The agent died bankrupt, the bond being found in his possession. The Court held the bond delivered as regards the sum of £669 paid to the borrower, but undelivered as regards the balance of £231.

Where a deed is in neutral custody, the custodian being agent for neither party, there is a presumption for delivery, if it is an onerous contract, and against delivery, if it is gratuitous.

Certain unilateral deeds, such as testamentary writings, are effectual without delivery.

LOCUS PÆNITENTIÆ.—*Locus pænitentiae* is the right to draw back from an incomplete contract. It exists under a variety of circumstances. A person can exercise the right at any time while he is merely negotiating and has not completely bound himself. If a contract, such as one dealing with land, requires to be constituted by writing, or if the parties have stipulated that an agreement is to be reduced to writing before it should become binding, either party may resile until that has been done. Further, the privilege of resiling will remain so long as a writing is lacking in the formalities necessary to constitute a particular contract; as in the case of a five years' lease or a contract for sale of land which, although signed by the parties, is neither holograph nor attested. In a mutual contract, until all parties are bound, any one may

resile. A unilateral contract, as a rule, requires to be delivered before it is binding. It is in the power of one of several co-obligants to a bond to resile before delivery of the bond to the grantee.

But there are circumstances in which, although a contract is formally incomplete, the power to resile is barred by certain conduct on the part of one or other of the parties. In other words, *locus pœnitentiæ* is barred by two personal exceptions, namely, *rei interventus* and homologation.

REI INTERVENTUS.—*Rei interventus* arises from the conduct of one of the parties, who acts upon the contract as if it were complete. With the knowledge or permission of the other party, he acts in such a way on the faith of the contract as to cause material loss or inconvenience to himself, if the other should repudiate it. In these circumstances, the other party is not allowed to resile. Thus, if a party grants an improbativè letter of guarantee to a bank for repayment of an advance, and the bank advances a sum of money on the faith of the guarantee, the document is validated by *rei interventus*, and the granter cannot escape liability on the ground that the guarantee was neither holograph nor attested.

The following comprehensive definition of *rei interventus* is given in Bell's Prin., section 26, and has been frequently quoted with approval in judicial decisions:—

“It is inferred from any proceedings not unimportant on the part of the obligee known to and permitted by the obligor to take place on the faith of the contract as if it were perfect, provided they are unequivocally referable to the agreement and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable.”

The following essentials of *rei interventus* should be noted:—

1. There must be agreement between the parties. Thus,

a draft of a contract, the terms of which have not been adjusted, is not sufficient.

2. The acts must be unequivocally referable to the agreement. Thus, an informal written lease may be perfected by a tenant executing improvements on the faith of it. On the other hand, mere possession will not set up a parole lease for a number of years, as the possession might obviously be referable to a yearly tenancy. Positive acts are not always necessary. Abstaining from proceedings which one would have taken but for the reliance on the agreement may be sufficient.

3. The party pleading *rei interventus* must in consequence of his relying on the agreement be placed in circumstances by which he would suffer considerable, though not irreparable, loss or inconvenience, if the agreement were not implemented. It is not necessary that the other party should derive any benefit.

4. The other party must know of the acts and permit them to take place. It is sufficient, however, if the acts are such as would naturally be in contemplation when the agreement was entered into.

HOMOLOGATION.—Homologation consists of acts of the granter of an obligation in a defective contract confirming or adopting the obligation as binding. The definition in Bell's Prin., section 27a, is—"Such acts of the obligor as imply distinct and unequivocal consent; and it may perhaps be said, such as make it unfair or contrary to good conscience to hold that he is not bound." Homologation is similar in principle to *rei interventus*, and establishes a contract defectively entered into. For example, a deed granted by a minor without consent of his curators may be homologated by him after attaining majority.

Homologation may be express or inferred from circumstances, but must be unequivocal. The party homologating must have full knowledge of the extent of the obligation and of his interests and legal rights.

Homologation is retrospective in its effect confirming the agreement from the beginning.

There can be no homologation of a void contract. Thus, a deed signed by a pupil, being void, and having no legal effect, is incapable of being homologated. It may, however, be adopted, but it becomes binding only from the date of adoption.

IV.—Construction of Contracts.

After a contract has been completed, disputes sometimes arise as to its meaning. If the meaning of the words is plain and obvious, that is conclusive of the intention of parties. Explanatory or constructive evidence can only be led where the terms are ambiguous and the meaning uncertain. In construing a contract the aim is to get at the intention of the parties when they entered into it. A glaring ambiguity may be fatal to the contract. The popular meaning of the words used is to be taken, unless the words are technical, or have a special meaning attached to them by usage of trade. Between two persons in trade the presumption is that the technical meaning was intended, and in dealings with an ordinary member of the public the ordinary meaning is presumed. Thus, in the rabbit trade, "a thousand rabbits" means twelve hundred; amongst actors "year" means theatrical year; in the publishing trade, in dealings between wholesale and retail firms, "two dozen" means twenty-five.

Any such usage of trade must be general and known to both parties, or, at least, such as the parties ought to have known if they had had a reasonable acquaintance with their business. Local custom may be binding provided it is reasonable.

The prior usage of the same parties under similar circumstances may also determine the meaning of what is ambiguous.

In construing a contract, however, one cannot do more than translate the terms used; one cannot vary or alter these terms, so that usage can only be admitted to ascertain the exact meaning and intention of the parties.

If the meaning of the parties cannot be ascertained the contract falls, and a Court of law can do nothing to rectify it.

V.—Assignment of Contracts.

GENERAL.—It is competent to transfer obligations from one creditor to another, to substitute a new creditor for the original.

But all contracts cannot be assigned. Sometimes the nature of the contract makes assignation impossible. Thus a contract between master and servant is unassignable, as the individuals are of the essence of the contract. An agricultural tenant cannot assign his rights of possession on the theory that the landlord has chosen him and him only as a suitable tenant, while an assignee might not have any qualifications for farming. On the other hand, a landlord may assign his rights, as a change of landlord is not considered material to the tenant. In partnerships a partner, while he may assign his share of the profits, cannot assign his right to management.

As a rule, contracts involving mutual obligations cannot be assigned. Thus, if A sells goods to B, he cannot assign his contract to C, so as to put C in his place, giving him a right to perform the contract and sue for the price. An exception is made in the case of bills of lading, it being provided by the Bills of Lading Act, 1855, that a consignee of goods named in a bill of lading, and every indorsee of the bill of lading to whom the property of the goods passes, acquires all rights of suit, and becomes subject to the same liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself.

FORM OF DEED.—The granter of an assignation is termed the cedent, and the grantee is called the assignee. In the old style of deed of assignation the cedent made the assignee his mandatory or procurator, “making and constituting” the assignee “his lawful cessioner and assignee in and to” the subject assigned, and “surrogating and substituting” him in and to the cedent’s full right and place in the premises.

By the Transmission of Moveable Property (Scotland) Act, 1862, a short and simple form of assignation has been introduced which may be used by any party in right of a personal bond or of a conveyance of moveable estate. The form prescribed simply states the consideration and assigns the bond or the deed described. It applies to bonds and assignments of every kind, decrees, policies of assurance, protests of bills, &c., the words “moveable estate” including all personal debts and obligations and moveable or personal property or effects of every kind.

INTIMATION.—To complete an assignation it must be intimated to the debtor. This is necessary to divest the old creditor and to interpel the debtor from paying to him. An unintimated assignation might be defeated by a second assignation being first intimated to the debtor, by the debtor paying to the old creditor, by diligence of the latter’s creditors or his bankruptcy. The most formal method of intimation is by notary public, the intimation being attested by a notarial instrument. Under the 1862 Act already mentioned formal intimation of assignations to which the Act applies may be made (1) by a notary delivering a certified copy in presence of two witnesses, and granting a certificate of intimation, or (2) by the holder of the assignation or any one authorised by him sending a certified copy by post, and the debtor granting a written acknowledgment.

Intimation, however, may be made informally in any way that brings home to the debtor distinct knowledge

of the assignation, and any act of the debtor recognising the assignation is sufficient. Thus the debtor may be a party to the assignation; he may write to the assignee acknowledging his right; he may pay the interest or part of the principal of the debt to the assignee. These acts are sufficient to take the place of the usual intimation. But mere private knowledge, while it may put the debtor in bad faith in paying to any one but the assignee, is not equivalent to intimation in questions with properly completed assignations, legal or voluntary.

TRANSFER WITHOUT DEED.—In certain cases a deed of assignation is unnecessary. Thus the obligations contained in bills of exchange or promissory notes may be transferred by delivery or by indorsation and delivery, according as they are payable to bearer or to order. The rights under a bill of lading also pass by indorsation and delivery. The transfer of a document of title to goods may be by indorsement, or where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery. The expression “document of title” is defined by statute to include “any bill of lading, dock warrant, warehouse-keeper’s certificate and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented” (Factors Act, 1889, section 1).

The indorsation and delivery of bills of exchange and bills of lading operate as a complete transfer of the rights contained in these documents without intimation. In the above documents of title, other than bills of lading, intimation is necessary.

RIGHTS OF ASSIGNEE.—The new creditor gets no better or higher right than the old. This rule is expressed in

the legal maxim, *Assignatus utitur jure auctoris*. Any defence competent to the debtor against the original creditor is competent against the assignee. Thus, an assignee might find that the debtor had a claim of compensation against the original creditor, such as to make his assignation useless. The assignee may sue in his own name or in the name of the cedent, if he is alive.

NEGOTIABLE INSTRUMENTS.—The rule of the last paragraph does not apply in the case of negotiable instruments. These documents enjoy very important privileges. In negotiable instruments the assignee who takes in good faith and for value is entitled to recover what is due on the face of the document. He acquires his rights free from any defects in the title of his assigner or any previous holder. A negotiable instrument may be transferred very simply. If payable to bearer it is transferred by mere delivery, if to order by indorsation and delivery. A holder is always presumed to have taken in good faith and to have given value unless the contrary is proved.

Bills and promissory notes and bank cheques are negotiable during currency. In order to restrict such a document to be merely assignable, the words "not negotiable" may be written upon it. Certain bonds and debentures payable to order or to bearer are also negotiable, and documents of title to goods are negotiable to a certain extent.

ASSIGNATIONS OF PARTICULAR KINDS OF PROPERTY.—Assignations of patents, designs, and trade marks and copyright; transfers of ships and shares in ships; transfers of shares in companies, and other assignations will be referred to later in dealing with particular contracts. Assignations of leases and heritable securities and other heritable rights are not discussed here, as they do not come properly within the scope of this handbook.

ASSIGNATION BY DEATH OR BANKRUPTCY.—The rights and obligations under contracts are assigned by death or bankruptcy. In the case of death the executor or personal representative of the deceased takes the place of the deceased, acquiring his rights and being answerable for his liabilities to the extent of the deceased's estate. This rule does not apply in contracts involving personal services, such as between master and servant, which, from their nature, are extinguished by death. In the case of bankruptcy, the rights under contracts pass to the trustee for the benefit of the creditors, and he is responsible for the liabilities to the extent of the estate. The subject of bankruptcy will be discussed later.

VI.—Extinction of Contracts.

The obligations contained in contracts may be extinguished in the following ways:—

PAYMENT OR PERFORMANCE.—A contract is extinguished by fulfilment of its terms, *e.g.*, by performance of an act or payment of a debt.

Payment of a debt may be made by the debtor or any one on his behalf. If the debt is paid by some one other than the debtor, the creditor *may*, without the consent of the debtor, grant an assignation of the debt to that person, and at the request of the debtor he *must* grant such an assignation provided that the assignation will not prejudice his interests in the debtor's estate. Also, if the creditor is taking proceedings against his debtor for payment of the debt, he must, if requested, grant an assignation in favour of any one paying the money.

If a person owes several debts to one creditor and sends a payment insufficient to meet them all, how is the creditor to apply the money? If the debtor at the time of payment indicates to which debt the payment is to be appropriated, the creditor must so apply it. If the

debtor makes no appropriation, the creditor may do so in the receipt which he grants, or, within certain limitations, at any time before action; he may even, when some of the debts are secured and some unsecured, apply the payment to the latter. Failing appropriation by either debtor or creditor, the payment is appropriated to the various debts in their order.

If a debtor in sending a remittance of less than the full amount of his debt states that the remittance is sent "in full settlement" or on conditions to which the creditor cannot agree, the creditor's only safe course in order to preserve his right to full payment of his debt is to return the remittance. The question has been much canvassed as to whether the creditor may safeguard his claim for the balance of the debt by intimating to the debtor that he declines to accept the sum tendered in settlement, but has placed it to account of the sum due. There have been varying and conflicting decisions in the English Courts and in the Sheriff Courts of Scotland. In the absence of any authoritative decision of the Supreme Court, and in view of the general rule recognised in many Courts that a remittance must either be accepted with the conditions imposed upon it or must be returned, the safer course is clearly to return all remittances which are sent with conditions attached, which the creditor is not prepared to accept. In the most recent Sheriff Court decision it was held that if a partial remittance is sent, not by way of compromise of a disputed claim, but as in settlement of a debt admittedly due, the remittance may be applied to account. (See *M'Kean & Buchanan v. Watson*, 1910, 26 Sh.Ct.Rep. 207, and cases therein referred to.)

Where a debt is constituted by writing, the discharge ought to be in writing, failing which, payment can only be proved by the oath of the creditor. As we have already seen, receipts for rent and receipts in mercantile matters do not require to be holograph or tested. They only require to be signed by the granter. Receipts for

termly payments of interest in practice enjoy the same privileges.

The rule is that payments of sums exceeding £8 6s. 8d. can only be proved by the writ or oath of the creditor. Up to that amount parole evidence is sufficient. But in ready money transactions payment may always, irrespective of the amount involved, be proved by parole. In the case of bills, promissory notes, and cheques of whatever amount, any fact relevant to any question of liability on these documents may be proved by parole. If payment is made by the creditor's intromissions with the estate of the debtor, it may be proved by parole. By custom, payment of wages at the proper time does not require written receipt.

In some cases there is a presumption of payment. If a document of debt, *e.g.*, a bill, is in the hands of the debtor, payment is presumed. In the case of periodical payments, such as rents, feu-duties, salaries, interest, and the like, where there are discharges for three consecutive terms, all prior payments are presumed. So, in certain circumstances there may be a presumption that payment was made at a certain time, *e.g.*, by a guest before leaving a hotel. Delay and silence—in legal language called *mora* and taciturnity—may in special circumstances be such as to presume payment. In all these cases the presumption of payment may be rebutted by parole evidence.

Where the obligation in the contract is to perform a certain act—an obligation *ad factum præstandum*—performance may be proved by parole.

IMPOSSIBILITY OF PERFORMANCE.—Impossibility of performance does not in the general case excuse the obligant, and is no answer to a claim of damages for non-performance. If a person undertakes what he cannot perform, the contract is not thereby extinguished, and he is liable

in damages for breach of contract. But to this rule there are the following important exceptions:—

(1) The impossibility may be due to the existence of a state of things unknown to the parties at the date of the contract, such as the sale of a cargo which had perished before the sale. In such a case, as we have seen, the contract is void on the ground of essential error.

(2) The obligation to deliver a specific thing ceases on the destruction of the thing without fault on the part of the person under obligation to deliver. Where a specific thing is sold, and perishes without fault on the part of the seller before delivery, the seller is not liable in damages for failure to deliver (*Leitch*, 1900, 2 F. 904).

(3) Where the contract is to perform a purely personal act, such as painting a picture, supervening incapacity extinguishes the contract and relieves from the consequences of a breach of contract.

(4) Where performance becomes illegal or impossible in consequence of subsequent legislation, the contract is extinguished.

COMPENSATION.—Compensation is a provision for setting debts off against each other, where one person is both debtor and creditor of another. Thus, A may be due B a debt of £50 on one transaction, while on another transaction B may be due A £30. By compensation these debts may be set off against each other, with the result that both obligations are extinguished by payment of the difference of £20 by A to B.

Compensation requires to be pleaded, it does not operate *ipso jure*. In other words, A's debt of £50 to B is not automatically extinguished to the extent of £30, but if B takes an action against A for £50, A could plead the counter claim of £30 in defence, with the result that B could only get a decree for the balance of £20. When compensation is pleaded the effect draws back to the time

when the debts co-existed and to the extent of the course stops the running of interest from that date.

To found compensation, the following conditions must be complied with:—

(1) Both parties must be debtor and creditor at the same time, and each in his own right. I cannot set off a claim due by me as a trustee against a claim due to me personally.

(2) Both debts must be of the same nature. It is impossible to set off an obligation to perform some act against a money debt.

(3) Both debts must be due and liquid, or at least capable of being instantly verified by writ or oath. Thus, a person, upon whom a demand is made for payment of a debt instantly payable, cannot plead compensation on a future debt, *i.e.*, a debt due but not yet payable, or a contingent debt, *i.e.*, a debt the payment of which depends upon the fulfilment of some condition. But to this rule there is an exception, *viz.*, that an illiquid claim of damages may be pleaded as a defence in an action where it arises out of the contract sued on.

There is no compensation between a debt due to a firm and a debt due by a partner of that firm. But after dissolution of a solvent firm the debtor of the firm, if he is creditor of a partner, may plead compensation to the extent of the partner's share in the debt due by him. If a firm is called upon to pay a debt due to a person who is debtor to a partner, the firm may arrange with that partner to take an assignation of his debt, and thus be in a position to plead compensation. Such an arrangement cannot be carried out after bankruptcy. If, after the firm is dissolved, a claim is made against a partner for a firm debt, he may then set off against it a debt due to himself.

In bankruptcy every kind of claim, including future and contingent debts, may be set off if the debts have existed prior to bankruptcy.

RELEASE.—Release or acceptilation occurs where the obligation in the contract is discharged by the party in right of it without payment or performance. Release may be proved by the same kind of evidence as is required to prove the contract. Where the document of debt is given up to the debtor, discharge may be presumed.

NOVATION is the substitution of a new obligation for an old one, so as to discharge the old. For example, a new bill may be accepted in place of an old bill, and the old one torn up. Discharge of the old debt is not readily presumed.

DELEGATION is the substitution of a new debtor for the former debtor. The creditor must agree not only to accept the second debtor, but to release the first. Very clear proof is required.

CONFUSION.—An obligation is extinguished by confusion when the same person becomes both debtor and creditor. It may occur by a debtor succeeding to his creditor's estate. Where a man has both a right to exact a debt, and is also liable for it, that debt is extinguished *ipso facto*. He must, of course, be debtor and creditor in the same capacity. If the debt were due by him as trustee to himself personally, there would be no confusion.

PRESCRIPTION.—Obligations may be extinguished and rights of action may be cut off by lapse of time. This method of extinguishing obligations is called prescription.

1. *Triennial Prescription.*—This is one of the most important prescriptions in practice. By Act 1579, cap. 83, it is provided “that all actions of debt for house maills, men's ordinaries, servants' fees, merchants' accounts, and other like debts that are not founded upon written obligations, be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ or by oath of the party.”

This prescription has reference to ordinary shop accounts, law agents' accounts, servants' and workmen's wages, house rents where the lease is verbal, and such like debts where there is no written contract. It has been held to apply to accounts due to engineers, surveyors, architects, printers, and druggists.

A debt of the nature to which this prescription applies must be sued for within three years, otherwise the creditor cannot prove the debt except by the writing or the oath of the debtor. At the end of three years the law presumes (1) that the debt never existed, and (2) that, if it ever existed, it has been paid. The creditor must prove by the writ or oath of the debtor both the constitution of the debt, and that it is still resting owing. Prescription does not extinguish the debt in this case, but merely limits the mode of proof with regard to it. The writ, in order to prove the subsistence of the debt, must be dated after the three years. The writ of an agent who is authorised to bind the debtor is sufficient.

The three years are calculated from the day of payment of termly debts, such as rent and wages, and from the date of the last item of a running account. It is a popular error to suppose that the three years count from the date of the last payment to account. Payments to account of a debt do not affect the running of prescription.

If the original debtor has died, the creditor may take action against the debtor's representative, by whose writ or oath he must prove both the constitution and subsistence of the debt.

Cases of the triennial prescription of shop accounts are of very frequent occurrence in our Small Debt Courts.

2. *Quinquennial Prescription*.—All bargains concerning moveables or sums of money, to the constitution of which writing is not necessary, and which may be proved by witnesses, prescribe within five years. After that time they can be proved only by the writ or oath of the debtor.

Contracts of loan, pledge, deposit and hiring and sales of moveables fall under this head.

3. *Sexennial Prescription*.—Bills of exchange and promissory notes are of no force, unless diligence or action is commenced within six years after they become exigible. See pp. 153 and 161.

4. *Septennial Prescription*.—Certain cautionary obligations prescribe in seven years. See p. 172.

5. *Decennial Prescription*.—All actions of count and reckoning by pupils and minors against their tutors and curators prescribe ten years after the majority of pupils and minors, or after their death if they die in minority.

6. *Vicennial Prescription*.—Holograph missive letters and holograph bonds and subscriptions in account books, without witnesses, if not sued for within twenty years, shall prescribe, “except the pursuer offer to prove by the defender’s oath the verity of the said holograph bonds and letters and subscriptions.” This prescription does not run against minors.

7. *Forty Years’ Prescription*.—Known as the long negative prescription. A right is lost or forfeited “by the proprietor neglecting to exercise or prosecute it during that whole period (viz., forty years) which the law hath declared to infer the loss of it” (Ersk. Inst. III. 7, 8). Any contract, therefore, which during a period of forty years is not insisted on, is thereafter extinguished. The years of minority are not reckoned in the period of the prescription.

CHAPTER II.

SALE OF GOODS.

SALE OF GOODS ACT, 1893.—The law relating to sale of goods is now regulated by the Sale of Goods Act, 1893, 56 & 57 Vict. cap. 71. The sections referred to in this chapter, where not otherwise indicated, are sections of this Act.

CONTRACT OF SALE (section 1).—A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods—that is, the ownership in them—to the buyer for a money consideration, called the price.

There are two different kinds of contract of sale, viz., (1) whereby the seller *transfers* the property to the buyer, and (2) whereby the seller *agrees to transfer* the property to the buyer. Where the property in the goods is transferred from the seller to the buyer the contract is called a *sale*; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an *agreement to sell*. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled.

CAPACITY TO BUY AND SELL (section 2).—Capacity to buy and sell is regulated by the general law concerning capacity to contract (see pp. 19 to 27), and to transfer and acquire property. Where necessaries are sold and delivered to a pupil, or minor, or to a person who, by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them. Necessaries mean goods suitable to the condition

in life of such person and to his actual requirements at the time of the sale and delivery.

FORMALITIES OF THE CONTRACT (section 3).—The contract may be made in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties (*e.g.*, goods sent on “sale or return” and kept an unreasonable time).

SUBJECT-MATTER OF THE CONTRACT.—The term “goods” includes all moveable things except money. It also includes industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale (section 62).

The goods may be either (1) existing goods, owned or possessed by the seller; or (2) “future goods,” *i.e.*, goods to be manufactured or acquired by the seller after the making of the contract (section 5).

If specific goods have perished at the time when the contract is made without the seller’s knowledge, the contract is void (section 6). For example, a contract to sell a cargo of corn, which, unknown to the seller, had perished before the date of the contract, is void.

Similarly, if specific goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement to sell them is void (section 7). Thus, where A agreed to sell 200 tons of potatoes grown on particular lands, but, owing to blight, the lands produced only 80 tons, there was no obligation on A as to the shortage of 120 tons (*Howell v. Coupland*, 1876, 9 Q.B. 462).

It will be observed that these rules apply only to specific goods, *i.e.*, to goods “identified and agreed upon at the time the contract is made.” They do not apply to sale of general goods, which must be furnished by seller.

THE PRICE.—The price may be (1) fixed by the contract, (2) fixed in manner specified in the contract, or (3) determined by the course of dealing between the parties. Failing all of these, the buyer must pay a reasonable price (section 8).

Where it is agreed that the price is to be fixed by the valuation of a third person, his failure to make the valuation renders the contract void, but if the goods or part of them have been delivered to and accepted by the buyer, he must pay a reasonable price. If the valuation is prevented by the fault of the buyer or seller, the other party may maintain an action of damages against the party in fault (section 9).

The price must be money. If the consideration for the transfer of goods is other goods, the contract is barter or exchange, not sale; but if the consideration consists partly of other goods and partly of money, the contract is deemed to be a contract of sale.

If insisted on, the price must be in legal tender. In Scotland legal tender is usually confined to coinage, namely, gold, for any amount, silver for an amount not exceeding £2, and bronze for an amount not exceeding 1s. Scotch bank notes are not, as a rule, legal tender, but Bank of England notes are legal tender in England, although not in Scotland. By the Currency and Bank Notes Act, 1914, passed on 6th August, 1914—immediately after the outbreak of war, the Treasury were authorised to issue currency notes for £1 and for 10s., which should be legal tender in the United Kingdom for the payment of any amount. For the purpose of meeting immediate exigencies, postal orders were by the same Act made legal tender for any amount, but only until His Majesty should revoke the same by proclamation. Scotch bank notes were also temporarily made legal tender for payment of any amount in Scotland.

If on paying the price a condition is made in which the seller, either passively or tacitly, acquiesces, such

condition must receive effect. For example, a merchant who had bought potatoes from a farmer, whose crop and stock had been sequestrated at the instance of his landlord, agreed to pay the price to the landlord's factor on the condition that he should guarantee delivery of the goods. In sending a cheque for the price he stipulated that such guarantee should be granted. The factor retained and cashed the cheque, but refused to guarantee delivery of the potatoes. The merchant accordingly raised an action against the factor for re-delivery of the cheque or for the amount thereof, and was successful. The Court held that the factor was not entitled to retain the cheque except on the condition attached by the purchaser, and that he was bound to repay the amount (*Semple v. Wilson*, 1889, 16 R. 790).

Can a cheque sent in full payment of a claim for a larger sum be cashed and the amount merely placed to account? As already mentioned, this question is not free from doubt, and has not been authoritatively decided. (See *supra*, p. 54.)

In regard to proof of payment, written evidence is required in Scotland, unless the transaction is for ready money or the amount is under £8 6s. 8d. (£100 Scots). In England either written or oral evidence is allowed to prove payment.

IMPLIED CONDITIONS AND WARRANTIES (sections 12-15).

—In a contract of sale there are several conditions and warranties implied by law which receive effect, unless they are excluded by the terms of the contract.

With regard to title, there is an implied condition that the seller has a right to sell the goods.¹ There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods, and² also that they are free from any charges or incumbrances in favour of third parties which are not declared or known to the buyer at the time when the contract is made.

Where the goods are sold by description, there is an implied condition that they shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

There is no implied warranty or condition as to quality or fitness for any particular purpose, except in the following cases:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. *E.g.*, in a contract between a Glasgow trader and Canadian dealers in hay, the hay to be supplied was described as "No. 1 export hay." No question would have arisen if that had been all, because the hay answered that description. But the buyer had communicated to the seller that he wanted this hay for the purpose of fulfilling a contract with the Glasgow Tramway Company, and that the company were entitled to get hay of a certain standard. The hay sent was No. 1, but it was not of the standard required. The Glasgow trader was held entitled to reject the hay (*Jacobs v. Scott & Co.*, 1889, 2 F. (H.L.) 70).

Where, however, a specified article is sold under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. *E.g.*, the Corporation of Glasgow bought an apparatus known as "Patterson's Smoke Prevention Suction Draught for Land and Marine-Boilers." After the apparatus had been erected the Corporation rejected it as disconform to contract, in respect that it did not prevent smoke; but the Court decided against the Corporation on the ground that

there was no implied warranty, the apparatus being a specified article sold under its trade name (*Paul & Co. v. Corporation of Glasgow*, 1900, 3 F. 119).

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed. *E.g.*, a buyer was successful in an action against a seller where he bought a carriage pole with a flaw in it, the flaw having been painted over in such a way that an examination did not reveal the defect.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) The general rule does not affect specific conditions and warranties laid down by special statutes. *E.g.*, by the Chain Cables and Anchors Act, 1874, in a contract for sale of a chain cable there is an implied warranty that it has been tested and stamped. By the Sale of Food and Drugs Acts there is a penalty on sale of food or drugs not of the nature, substance, or quality demanded. By the Merchandise Marks Act, 1887, a warranty of genuineness is implied from a trade mark or trade description. By the Fertilisers and Feeding Stuffs Acts an invoice containing specified particulars acts as a warranty.

In the case of a contract for sale by sample there are three implied conditions, viz.:—

(a) That the bulk shall correspond with the sample in quality.

(b) That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(c) That the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

WHEN PROPERTY PASSES TO THE BUYER (sections 16-19). —It must be kept clearly in mind that the ownership of goods is not necessarily determined by possession of them. The buyer may become the owner of goods before he obtains possession, and the seller may continue to be owner after possession by the buyer.

The time at which the property passes to the buyer depends on the intention of the parties. To ascertain their intention regard is had to the terms of the contract, the conduct of the parties, and the circumstances of the case. Unless a different intention appears, the following rules are applied:—

(1) If the goods agreed to be sold are specific goods in a deliverable state, the property passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

(2) If the goods are specific, but the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, or has to weigh, measure, test, or do some such thing for the purpose of ascertaining the price, the property does not pass until such thing be done, and the buyer has notice of it.

(3) When goods are delivered to the buyer on approval or “on sale or return,” or other similar terms, the property passes to him (*a*) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; or (*b*) if he retains the goods without giving notice of rejection within the time fixed for their return, or within a reasonable time if no time has been fixed.

(4) Where unascertained or future goods are sold by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent

may be expressed or implied, and may be given either before or after the appropriation is made. Delivery to the buyer or to a carrier for the purpose of transmission to the buyer is such an appropriation.

0. D. (5) If the seller reserves the right of disposal of the goods until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions are fulfilled, even though the goods have been delivered to him.

Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

The essence of the change introduced by the Act into the law of Scotland, so far as regards transfer of property, is that, while formerly the property in goods did not pass to the buyer until delivery, it now passes according to the intention of parties irrespective of delivery.

RISK.—Suppose the goods are destroyed or damaged, who has to bear the loss? The rule is that the owner takes the risk. We have already discussed the rules as to ownership. The goods accordingly are at the risk of the seller until the ownership has passed to the buyer. When the buyer becomes owner the risk is his. The risk, like the ownership, may be the buyer's although he has not obtained delivery of the goods. But if delivery has been delayed through the fault of either buyer or seller, and loss is thereby occasioned, the party in fault is liable for such loss (section 20).

A rather curious case of risk came before the Court in *Kinnear v. Brodie*, 1901, 3 F. 540. A horse was purchased warranted as "correct in wind and work." The buyer tried the animal in a cart on the day of delivery, but it was very unruly and plunged violently, although carefully handled; the following day it was equally unmanageable, and ran into a mill dam and was drowned. The Second Division of the Court of Session held that the risk was with the seller, as the buyer was entitled to return the animal as disconform to contract. The inability to return was due to the seller's breach of warranty. Hence the buyer was not liable for the price.

The reasoning of the Court in this case has been criticised on the ground that "the subsequent death of the horse, even if caused by the vice against which warranty was given, could not of itself turn an unconditional sale into a conditional one, or re-transfer the risk to the seller while leaving the property with the buyer," and it is suggested that the buyer's proper remedy was under section 53 for the seller's breach of warranty (Brown on Sale of Goods, 1911 edition, p. 54).

TRANSFER OF TITLE (sections 21-26).—Where a person, who is not the owner, sells goods without the authority or consent of the owner, the buyer acquires no title to the goods.

If stolen goods have been purchased for value, the true owner can reclaim his property from an innocent purchaser. In England the rule is subject to the exception that where goods are sold in "market overt," *i.e.*, open and public market, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. This exception does not apply to Scotland. In Scotland the true owner cannot recover from an intermediate *bona fide* purchaser who has re-sold the goods. But if the goods are recovered

by the true owner from a *bona fide* purchaser, the latter can go against the party who sold to him, though innocent, on the ground of implied warranty as to title to sell the goods. In England, on the other hand, the true owner may make a claim against any purchaser of the goods, although he may have re-sold them. In England also, if the thief is prosecuted and convicted, the ownership of the goods reverts in the former owner, even though they had been sold in market overt.

Goods may, of course, be sold under any special common law or statutory power of sale (*e.g.*, sale of unredeemed pledges by a pawnbroker), or under the order of a Court of competent jurisdiction (*e.g.*, a sale under a poinding).

Where a person having sold goods remains in possession of the goods or of the documents of title to them, and delivers or transfers the goods or documents of title under any sale or pledge to a third person, who receives them in good faith and without notice of the previous sale, the third person will be entitled to the goods as against the previous buyer. "Documents of title" include bill of lading, dock warrant, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising by indorsement or delivery a transfer of the goods. (See p. 51.)

Where a buyer obtains possession of goods or documents of title with the seller's consent, and delivers or transfers the goods or documents of title under any sale or pledge to a third person, who receives them in good faith, and without notice of any lien or other right of the original seller, the third person is entitled to the goods as against the original seller.

PAYMENT AND DELIVERY (sections 28 and 29).—Payment and delivery are concurrent conditions. Unless otherwise agreed, the seller must give possession of the goods to the buyer in exchange for the price, and the buyer must pay the price in exchange for possession of the goods.

Apart from agreement, express or implied, between the parties, the place of delivery is the seller's place of business, if he have one, and if not, his residence. If specific goods are sold which to the knowledge of the parties are in some other place, then that place is the place of delivery.

Where the goods at the time of sale are in the possession of a third person, *e.g.*, a warehouse keeper, there is no delivery until that person acknowledges to the buyer that he holds the goods on his behalf. But this provision does not affect the buyer's right to delivery obtained by transfer to him of a bill of lading or other document of title to the goods.

DELIVERY OF WRONG QUANTITY (section 30).—Where the seller delivers a quantity of goods less than he contracted to sell, the buyer may reject them; but if the buyer accepts the goods so delivered, he must pay for them at the contract rate.

Where the seller delivers a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

Where the seller delivers the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

These rules are subject to any usage of trade, special agreement, or course of dealing between the parties.

INSTALMENT DELIVERIES (section 31).—Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Where the contract is that the goods are to be delivered

by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or to pay for one or more instalments, it is a question depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

DELIVERY TO CARRIER (section 32).—Where the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be delivery to the buyer.

The seller must make a reasonable contract with the carrier on behalf of the buyer, and if the route involves sea transit, he must give such notice to the buyer as may enable him to insure the goods.

DELIVERY AT DISTANT PLACE (section 33).—Where the seller agrees to deliver the goods at his own risk at a place other than that where they are when sold, the buyer nevertheless takes any risk of deterioration necessarily incident to the course of transit.

RIGHT OF EXAMINATION (section 34).—Where goods are delivered to a buyer, which he has not previously examined, he is not deemed to have accepted them until he has had a reasonable opportunity of examining them so as to ascertain whether they are in conformity with the contract.

When the seller tenders delivery of goods, he is bound, on request, to afford the buyer a reasonable opportunity of examining them.

ACCEPTANCE (section 35).—The buyer is deemed to have accepted the goods when he intimates to the seller that he

has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

RETURN OF REJECTED GOODS (section 36).—Where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS (sections 38-48).—So long as the buyer has not got actual possession of the goods the seller, who is still unpaid, may exercise certain rights with regard to them.

(1) *Lien, or Right of Retention for the Price.*—When goods have been bought and there has been no agreement to give credit, or the term of credit has expired, or the buyer has become insolvent, the seller is not bound to part with them until the buyer has paid or tendered the price. This is called the seller's lien or right of retention. In Scotland the seller has also the right to attach the goods while in his possession by arrestment or pouding.

(2) *Stoppage in Transitu.*—As a rule, if the seller, when still unpaid, allows the goods out of his possession, he has lost his rights against them. But if the buyer becomes insolvent (not necessarily bankrupt, but unable to meet his debts as they fall due), he may stop the goods in transit by taking actual possession of them or giving notice of his claim to the carrier.

(3) *Right of Re-sale.*—If the goods, which have not been paid for, are of a perishable nature, the seller may re-sell without giving notice. In other cases if he gives notice of his intention to re-sell and the buyer does not pay or tender the price within a reasonable time, he may

re-sell the goods and recover from the buyer damages for the loss.

The above-mentioned rights against the goods exist where the property has passed to the buyer in terms of the contract. If the unpaid seller is still owner of the goods, of course his rights as owner enable him to withhold delivery, stop the goods in transit, and re-sell.

To illustrate these points—A merchant in the country buys ten sacks of flour, without any stipulation as to receiving credit. The seller may decline to allow these sacks to leave his warehouse until they have been paid for. If the merchant refuses to pay, the seller may give him notice that if he does not receive payment within, say, three days, he will re-sell the flour. On expiry of the three days without payment he may re-sell and charge the buyer for any loss sustained by him. Suppose, now, the seller had delivered the flour to the railway company for transit to the buyer before being paid, he could not then ask the company to give him the goods back unless his customer had become insolvent. If he stops the goods in transit and it turns out that his customer was solvent, the latter would be entitled to damages.

REMEDIES OF THE SELLER (sections 49 and 50).—Besides these rights against the goods not paid for, the seller has the following remedies as against the buyer:—

(1) *Action for the Price*.—He is entitled to take an action in Court for payment of the price as soon as the price is payable in terms of the contract, whether the property in the goods has passed to the buyer or not.

(2) *Damages for Non-acceptance*.—If the buyer refuses to accept delivery at the proper time and place, the seller has a good action of damages against him for the loss occasioned by his so refusing. Where there is an available market for the goods the measure of damage is the difference between the contract price and the current

or market price at the time when the goods ought to have been accepted.

REMEDIES OF THE BUYER (sections 51-54 and section 11 (2)).—The buyer has the following remedies against the seller:—

(1) *Damages for Non-delivery*.—If the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action of damages against him for the loss thus occasioned. The measure of damages is ascertained in the same way as in the case of non-acceptance. Where there is an available market for the goods, it is the difference between the contract price and the market or current price of the goods at the time they ought to have been delivered. Where there is no available market in which the buyer can obtain similar goods, the seller is liable in whatever damages are the natural result of his breach of contract. Each case will be determined by its own particular circumstances. Thus, a seller failed to deliver Danish hay and straw according to contract at Aberdeen. At Leith and certain other ports in Scotland hay and straw of the same kind could have been purchased at a price lower than that in the contract. There was, however, no market at Aberdeen for Danish hay and straw. In these circumstances it was held that there was no duty on the purchaser to take extraordinary measures to supply himself by applying at Leith or elsewhere, and that the seller was bound to pay the buyer's loss of profit on the re-sale as damages (*Gunter & Co. v. Lauritzen*, 1894, S.L.T. 1, p. 435; 31 S.L.R. 359).

(2) *Specific Performance*.—In case of non-delivery of specific or ascertained goods the Court may, if it think fit, order the seller to perform the contract specifically, that is, to deliver the identical goods in terms of his contract, without giving him the option of retaining the goods and paying damages. Thus, a lover of antique furniture purchases a particular article of some rarity

from a firm of cabinetmakers for £50. If the firm, on finding afterwards they can get £65 for the same article, refuse to give delivery to the first buyer, the latter may get an order for delivery from the Court. The return of the money, and some compensation in addition, would not make up to such purchaser for the loss of the particular article of furniture. The Court will grant an order for specific implement, unless performance is shown to be impossible, or would involve a purchase by the seller from a third party at an exorbitant price.

In case of non-delivery, therefore, the buyer has in certain circumstances two alternative claims, namely, for specific performance and for damages. These two alternative claims he may combine in one action.

(3) If the seller fails to perform any material part of a contract of sale, the buyer may either (a) reject the goods within a reasonable time after delivery and treat the contract as repudiated, or (b) retain the goods and claim damages (section 11 (2)). By this provision the Sale of Goods Act introduced a new remedy in favour of the buyer. He previously possessed the right to reject the goods and repudiate the contract but not to retain the goods and claim damages, except in cases where some latent defect was discovered only after the article had been consumed or used, so as to make restoration impossible. The buyer in Scotland is now in even a more advantageous position than the buyer in England. The English law does not give the buyer an option of two remedies, but states the circumstances in which he may avail himself of the one or the other. It is based on a distinction between a condition and a warranty which is not recognised in the law of Scotland. As regards Scotland, a breach of warranty is deemed to be a failure to perform a material part of the contract (section 62).

(a) *Rejection of Goods and Repudiation of Contract.*—It is important to observe that the rejection must be within

a reasonable time. If the breach of the contract is patent, the buyer must intimate rejection immediately on delivery, and if latent immediately on the defect being discovered. A great deal depends upon the subject-matter of the contract. For example, in the case of seeds, the defect might not be ascertained until the crop begins to come up; so in the case of machinery, which may go well for a long time and not show defects until long afterwards. Where a printing machine had been in use from March, 1901, till July, 1902, and was then rejected because of inherent defects, the buyer was held to have timeously exercised the right of rejection (*Aird & Coghill v. Pullan*, 1904, 7 F. 258).

In addition to rejecting the goods, the buyer, of course, may have an action of damages for any loss sustained by him through the seller's breach of contract. The seller is in the position of having failed to deliver the goods contracted for, and is liable for damages for non-delivery, which we have already dealt with.

(b) *Retain Goods and Claim Damages*.—If the buyer elects to retain the goods he may maintain an action for damages, or if he has not already paid the price he may deduct the damages from the price.

It is important to notice that these remedies of rejecting the goods and repudiating the contract on the one hand, and retaining the goods and claiming damages on the other, are alternative. If the buyer definitely select one, he cannot afterwards fall back upon the other. He must be careful not to act in such a way as to lose both remedies.

In *Electric Construction Company v. Hurry*, 1897, 24 R. 312, the subject of sale was a dynamo which on erection on the buyer's premises did not conform to the conditions of the contract. The sellers tried for seven months to remedy the defects, at the end of which time the buyers rejected it. The sellers did not remove it, and the buyers

continued to use it for a further period of three months, when the sellers sued for the price. It was held that by continuing to use the dynamo after they rejected it the buyers had lost both remedies, and were compelled to keep the machine in its defective condition and to pay the full price. Lord Kinnear dissented from the judgment of the Court, and remarked upon the inconsistency of holding that the buyers could not reject the goods because they had in effect elected to retain them and at the same time that they could not claim damages on the assumption of their retaining the goods because they had elected to reject them.

This case was held binding by the Second Division in the subsequent case of *Croom & Arthur v. Stewart*, 1905, 7 F. 563. In that case an engineer contracted with an ironfounder to supply and fit up two mechanical stokers for two boilers at his works. The stokers were fitted up, and in the month of September the buyer intimated to the seller that he rejected the two machines on the ground that they were not conform to contract. He continued, however, to use the machines till the end of the year. The Court held that by so doing he had lost both remedies. Having retained and used the machines for two months after intimating rejection he lost the right of rejection; after having intimated his right of rejection he was not entitled to fall back on the alternative remedy of retaining the machines and claiming damages.

It has been submitted (see Brown on Sale of Goods Act, 1911 edition, p. 72) that the judgment in *Electric Construction Company v. Hurry* was practically overruled by the House of Lords in *Paton v. Payne*, 1897, 35 S.L.R. 112. On this point reference may also be made to *Relph v. Smith*, 1897, 14 Sh.Ct.Rep. 168; *Bonaccord Gas Company v. MacDuff*, 1903, 19 Sh.Ct.Rep. 332; *Bransome v. Evans*, 1905, 21 Sh.Ct.Rep. 152; *Young v. Ewing*, 1909, 25 Sh.Ct.Rep. 340.

PAYMENT INTO COURT (section 59).—In Scotland, if a buyer retains goods, which he might have rejected, and claims damages, the Court may, in an action by the seller for the price, require the price or part of it to be consigned or paid into Court by the buyer or reasonable security to be given by him.

SALES BY AUCTION (section 58).—The following are the rules applicable to sale of goods by auction:—

1. When goods are put up in lots, each lot is deemed to be the subject of a separate contract of sale.

The result is that no dispute in regard to one lot can affect the rest. Suppose a man bought a complete suite of furniture in separate lots, he could not reject the whole because of a dispute, say, as to the sideboard, the sideboard having been sold separately.

2. A sale by auction is completed when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement any bidder may retract his bid.

3. Unless the sale is notified to be subject to a right to bid on behalf of the seller, it is illegal for the seller or his representative to bid, and for the auctioneer knowingly to take such bid. A sale contravening this rule may be treated as fraudulent by the buyer. A fictitious bidder is called a "whitebonnet."

If the sale is fraudulent the buyer may repudiate the transaction. In Scotland he may also challenge the bid, and claim the lot as purchased at the last *bona fide* bid.

With regard to effects belonging to a trust estate, if there is only one beneficiary he cannot bid. When there are several beneficiaries, they may bid if the competition is *bona fide* and not fictitious. A trustee ought not to bid as an individual for property belonging to the estate of which he is the trustee; but, if he does so, he can only be called in question by a beneficiary, and not by any other person.

4. The sale may be notified (1) as subject to a reserved or upset price, or (2) subject to the seller's right to bid. A reserved price is sealed and not disclosed beforehand to the auctioneer. When the bidding ceases the auctioneer opens the sealed instructions and declares the sale complete or adjourned. An upset price is a price publicly stated beforehand. Unless the amount of the upset price is bid the goods are withdrawn. An upset price is common in Scotland and a reserved price in England. If the seller reserves a right to bid, the right can be exercised only by the seller himself, or by one person on his behalf.

SALE ON THE HIRE-PURCHASE SYSTEM.—This is a very common method of purchasing pianos, sewing machines, and other single articles of some value. The article is at first hired, but on certain instalments being paid it becomes the property of the person to whom it was hired. It is stipulated that the latter does not become owner until all the instalments are paid.

Where the person in possession has sold the goods before all the instalments have been paid, can the original owner recover from a person who bought them in good faith? This question has often come before the Court, and the answer depends upon the exact terms of the hire-purchase agreement. *E.g.*, A "lent on hire" to B a hansom cab, B to pay weekly instalments of £1 12s. till the sum of £20 16s. had been paid, when the cab was to become his property; failing the regular payment of any of the weekly instalments the cab to be returned to A. B got possession of the cab, but before the whole amount was paid up sold it to C. A was unsuccessful in an action against C for delivery of the cab as still his, on the ground—already dealt with under transfer of title, p. 70—that B, having obtained possession of the cab under an agreement to buy, was in the position to transfer the ownership under a sale to C, who received in good faith and without notice of A's right (*M'Laren v. M'Innes*, 1895, 12

Sh.Ct.Rep. 308). A would have safeguarded his interests if the agreement had been so expressed that B was not obliged to buy, but had only an option to buy, and might terminate the agreement by returning the cab at any time. A could in the latter case have recovered from C, as B was not in a position to give C a good title.

CHAPTER III.

CARRIAGE.

DEFINITION.—The contract of carriage deals with the transport of goods or passengers from one place to another in consideration of a hire. The uncommon case of gratuitous carriage, in which the carrier is only obliged to use reasonable care, does not call for remark. Carriage is either inland, including carriage on canals and inland waters, or sea carriage.

COMMON CARRIER.—A common carrier is one who holds himself out or offers himself to the public as willing to carry goods generally or certain classes of goods for any member of the public who chooses to employ him to and from certain places. He makes it his business to carry goods for all persons indiscriminately, but he may limit his business to the carrying of particular classes of goods. A person who is not a carrier by trade, and does not make it his business to carry goods, but who undertakes a particular contract of carriage, is sometimes called a special or private carrier, *e.g.*, a farmer engaging to carry goods from a house to a railway station. The same person may be a common carrier for some goods and a private or special carrier for other kinds. Railway companies are common carriers of goods (including all kinds of cattle and other animals intended for food and horses) and personal luggage. They are not common carriers of passengers. Owners of vessels trading from port to port and stage coach owners are common carriers of goods and luggage; cab proprietors, of luggage; and owners of carts and wagons regularly plying for hire between towns,

of goods. A common carrier is bound to take everything he professes to carry, so long as there is room, provided the consignor offers to pay his charge. He may decline dangerous, breakable, or defectively packed goods. He is not entitled to know the contents of a parcel, and a consignor may pack a number of parcels together into one package. But the consignor must disclose the kind of goods, if they are in any way dangerous, *e.g.*, gunpowder, nitro-glycerine, &c.

LIABILITY OF COMMON CARRIER.—The responsibility of a common carrier for the goods he carries is very great, the principle being adopted from an edict of the Roman Prætor to the effect that common carriers, innkeepers, and stablers are liable for the safety of the goods and effects committed to their care. The edict is in these words—“*Nautæ, caupones, stabularii, quod cujusque saluum fore receperint, nisi restituant, in eos judicium dabo.*” The object of the severity of the rule is to protect the owner against the special dangers of collusion and carelessness in such cases.

A common carrier is practically the insurer of the safety of the goods while in his custody. He is liable for all injury to them whatever, with the following exceptions:—(1) Where the loss arises from the consignor's own fault; (2) where it is due to the nature of the goods, *e.g.*, a cargo of oranges decaying during voyage owing to their perishable nature, or a restive horse becoming alarmed in transit and hurting itself; (3) where it is the result of unavoidable accident, the act of God, or the King's enemies.

With regard to the responsibility of a common carrier on land in case of accidental fire, there used to be a difference as between English and Scots law. In England the carrier was held responsible for accidental fire, but not in Scotland. The Mercantile Law Amendment Act, 1856, made both laws the same, and now in Scotland land

carriers are liable for accidental fire. In sea carriage the liability in this respect is different (see p. 86). On land common carriers are also liable for loss by theft or robbery. (*Cf.* Sea Carriage, p. 86.)

Carriers of passengers are not liable as common carriers for the passengers, but they are in general liable as common carriers for their luggage during transit. This rule applies even where a passenger takes his luggage with him into a railway carriage, unless his own negligence contributes to its loss or injury.

The carrier's responsibility ends when he makes or tenders proper delivery. If the consignee refuses delivery the carrier is then only liable as depository, *i.e.*, only for damage resulting from his own or his servant's negligence.

LAND CARRIERS ACT, 1830.—This Act limits the common law liability of carriers by land with the purpose of preventing hardship in the case of small parcels of valuable articles being lost without notice of their value having been given to the carrier. The articles to which the Act refers include gold or silver coins, precious stones, jewellery, watches, bills, bank notes, title deeds, pictures, glass, china, silks, lace, and furs. When the value of such articles contained in a parcel or package exceeds £10, a declaration of their value and nature must be made at the time of delivery, and the carrier is entitled to make an increased charge. The increased rate of charge must be notified by the carrier in his office or other place of business. If the owner of the goods in sending such a package neglects to make this declaration, the carrier is exempt from liability except for loss or injury arising from the felonious acts of his servants or his own personal misconduct.

The Act also provided that a common carrier cannot limit the amount of his liability by a public notice to that effect, but it left untouched the power of the carrier

to enter into special contracts with his customers limiting his responsibility in connection with the carriage of their goods.

RAILWAY COMPANIES.—Owing to the practical monopoly of land carriage in the hands of railway and canal companies, and the danger of oppression to traders, these companies are forbidden by the Railway and Canal Traffic Act, 1854, to limit their liability as carriers of goods by express agreements, unless—(1) The agreement is signed by the consignor of the goods or his agent; and (2) the terms of the agreement are such as the Court, before which any question relating thereto shall be tried, shall adjudge to be “just and reasonable.” What is just and reasonable is a question of circumstances. It is unreasonable for a company to contract that it is to be free from responsibility for damage however caused, unless there is an alternative choice to have goods carried at a higher rate in the ordinary way. If two alternatives are offered by a company, namely, a rate at the company’s risk and a rate at the owner’s risk, the latter is *prima facie* held to be reasonable if the higher rate at the company’s risk is within the charge exigible by statute.

The 1854 Act also provides that, unless a higher value has been previously declared, no greater damages can be recovered for animals conveyed than £50 for a horse, £15 per head for neat cattle, and £2 per head for sheep or pigs.

Under this Act these companies must provide reasonable facilities to the public for receiving, forwarding, and delivering traffic, and for the prevention of undue or unreasonable preference or advantage, prejudice or disadvantage in regard to any person or any particular kind of traffic.

Acts of 1873 and 1888 established a special tribunal—the Railway and Canal Commission—for administering the provisions contained in the 1854 Act and other enact-

ments regulating traffic facilities and other matters. The Commission has power to fix rates of carriage of goods, and determine disputes with regard to same.

SEA CARRIAGE.—A common carrier by sea has at common law the same liability as a common carrier by land, but in practice the liability of a shipowner is limited and defined by charter parties and bills of lading, which are special contracts made between the consignor and shipowner.

The common law liability of shipowners has also been limited by legislation from time to time. The statute law on the subject has been codified by the Merchant Shipping Act, 1894. This Act provides that a shipowner is exempted from liability—(1) For loss of goods, &c., caused by fire, which has happened without his actual fault or privity (*cf.* land carriers, *supra*); (2) for loss of gold, silver, jewellery, precious stones, &c., by robbery, embezzlement, or theft, unless the true nature and value of the same have been declared in writing to the shipowner or master at time of shipment; and (3) for loss arising from the fault of a pilot in charge of the ship in a “compulsory district,” *i.e.*, where the rules of the district authority enforce the employment of a pilot. Farther, in terms of the Act, shipowners are not liable beyond certain limits without actual fault or privity on their part, the limits being in respect of goods £8 per ton of the ship’s tonnage, and in respect of loss of life or personal injury, either alone or coupled with damage to goods, £15 per ton of the ship’s tonnage.

RIGHTS AND DUTIES OF CARRIERS IN GENERAL.—Apart from the special responsibility of common carriers, all carriers are liable for damage arising through the fault or negligence of themselves or their servants. They have a duty to take every reasonable care of the goods under their charge. Private carriers are not bound to carry

for every one except under special statutes, *e.g.*, statutes regulating the passenger traffic of railway companies which, having a monopoly, are not in the position of an ordinary private carrier. A private carrier must furnish means of transport sufficient for the journey in so far as human skill and foresight can provide, but is not liable for a latent defect therein, such as where a wheel breaks owing to air bubbles in casting, which the carrier could not foresee. Reasonable care must be exercised in packing and stowing, and the journey must be performed with reasonable expedition.

AFFREIGHTMENT.—Affreightment is a contract relative to the carriage of goods or persons by sea for a consideration, called the freight. In practice the contract is met with most frequently in two forms, viz., charter parties and bills of lading.

CHARTER PARTIES.—A charter party is usually on a printed form with blanks, which are filled up with the particulars of the proposed voyage. It is an agreement between a shipowner on the one hand and a merchant (called the “charterer” or “freighter”) on the other hand, whereby the former places his ship, or part of it, at the disposal of the latter for the transport of goods from one port to another for an agreed-on freight. It usually contains clauses with regard to lay-days, demurrage, and dead freight. “Lay-days” are the days allowed to the charterer for loading and unloading; “demurrage” is the sum payable for detention of the ship beyond the lay-days for loading and unloading; and “dead freight” is the payment exigible from a charterer who has failed to supply a full cargo in respect of the unoccupied space.

FORM OF CHARTER PARTY.—The forms of charter parties in use vary very much, each branch of the shipping trade

having a special recognised form of its own. The following is a form used in the coal trade:—

Newcastle-on-Tyne,
day of , 19 .

IT IS THIS DAY MUTUALLY AGREED BETWEEN A B & Co.,
of the good steamship called the "Bonaccord," of Aberdeen,
of the measurement of 670 tons burthen, or thereabouts, now
trading, and C D, of

That the said ship being tight, staunch, and strong in hull, machinery, boilers, &c., and every way fitted for the voyage, shall with all convenient speed proceed to Granton as directed, and there load as customary, from the factors of the freighters, a full and complete cargo of coals not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, furniture, and fuel; and being so loaded shall there-with proceed to Aberdeen, as may be so ordered, and deliver the same to the said freighter or his assigns alongside any wharf, store, steamer, or depôt, on being paid freight at and after the rate of shillings pence per ton of twenty cwts. delivered, or on B/L quantity at merchant's option, to be declared before breaking bulk. The freighter paying all customary dues and duties on the cargo, and the ship all other charges, during the said voyage.

The freight to be paid on unloading and true delivery of the cargo in cash.

No portion of the cargo to be used by the steamer or to be detained after discharging.

The steamer to employ merchant's porters for discharging, paying the customary charge, viz., per ton. hours to be allowed the said merchant for discharging the said cargo, according to the Customs of the ports (Sunday and holidays, also all riots, commotion by keelmen, pitmen, or any hands striking work, breakage of machinery, or frost, snow, or floods, or other accidents or causes beyond the freighter's control, which may prevent or delay the loading or delivery of the steamer, always excepted).

The time for discharging to commence when steamer is ready and written notice of readiness given (but not between 6 p.m.

and 6 a.m., and Saturdays from 4 p.m. to Mondays 7 a.m.). Bank Holidays and Sundays not to count.

Demurrage, over and above such lying hours, to be paid for at the rate of per hour.

(The act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted.)

The steamer to be addressed to receiver of the cargo, or his agent, for inward and outward Customs business, on usual terms.

If steamer is not ready for loading by 6 a.m. on the day of , merchants to have the option of cancelling this charter.

Steamer to have an absolute lien on cargo for all freight, dead freight, and demurrage.

Penalty for non-performance of this agreement, estimated amount of freight, to be paid as assessed and liquidated damages.

Negligence clause as per Baltic B/L, 1885.

	(Signed)	A B & Co.
<i>Witness.</i>	(„)	C D
<i>Witness.</i>		

The document is executed by both parties, and their signatures are attested by one or more witnesses.

The stamp duty is 6d., which may be denoted by an adhesive stamp to be cancelled by the person last executing the document. It may be after-stamped within one month after execution on payment of a penalty (Stamp Act, 1891, sections 49-51).

LIABILITIES OF SHIPOWNERS.—Under a charter party or bill of lading, whether expressly stated or not, the shipowner is liable to provide a seaworthy vessel, reasonably fit to carry the cargo, and furnished with a competent master and crew. The voyage must be performed with

all reasonable despatch, and there must be no deviation from the usual course of the voyage, unless compelled by storm or imminent peril or to save life.

BILLS OF LADING.—A bill of lading is an acknowledgment by the shipmaster or other agent of the shipowners of the receipt of goods on board, containing also the terms and conditions agreed on as to their carriage. It fixes the condition of the goods as received, and gives a title to demand delivery. It may be the only contract in connection with the carriage of the goods, or it may be used where there is also a charter party.

When a vessel has been chartered the master may sign a bill of lading as agent of the charterer, instead of as agent of the shipowner.

A particular consignee may be named in the bill of lading, to whom and "his assigns" the goods are to be delivered at the port of destination, or delivery may be to "bearer," or to the consignor and his assigns, or otherwise.

If in good condition the goods are said to be "shipped in good order." If certain particulars as to the cargo have not been ascertained by the master, he safeguards himself and the shipowners by adding such expressions as "quality or quantity unknown" or "weights and contents unknown." Great care ought to be exercised by the master in describing the condition of the goods, as the terms of the bill of lading will be conclusive evidence against himself and the owners.

A "clean" bill of lading is one in the ordinary recognised style, without any special stipulations or qualifications.

Bills of lading are made out in three copies—one for the shipper or consignor, one for the shipmaster, and one for transmission to the consignee. As in foreign bills of exchange, they contain a clause to the effect that one of the bills being accomplished, the other two are void.

The stamp duty is 6d., and the document must be stamped before execution. A penalty of £50 is incurred by making a bill of lading not duly stamped.

FORM OF BILL OF LADING.—The forms of bills of lading vary considerably according to circumstances, many shipping lines and particular trades having their own recognised forms, some of which contain clauses of inordinate length.

The following is a short and simple form in common use:—

Shipped in good order and condition by A B & Co., in and upon the good ship or vessel, called the “C,” whereof F G is master for this present voyage, and now lying in the port of X, and bound for Y, 275 tons of coal, being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned at the aforesaid port of Y (the act of God, the King’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind excepted) unto L M, or to his assigns; he or they paying freight for the said goods, and performing all other conditions as per charter party. In Witness Whereof, the master or purser of the said ship or vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at X, the day of , 1910.

Marks and numbers identifying the goods are inserted in the margin of the document.

TRANSFER OF THE GOODS.—The ownership of the goods may be transferred by indorsation and delivery of the bill of lading. By the Bills of Lading Act, 1855, the indorsee has the right to sue on the bill of lading, and is subject to the same liabilities as if the original contract had been made with him. If the bill is indorsed and delivered *bona fide* and for value, the consignor’s right of

stoppage *in transitu* is defeated. But beyond this the transferee (unlike the indorsee of a bill of exchange) obtains no higher right to the goods than the transferor had. As a consequence an indorsee cannot, for example, make the shipowner answerable for the fault of the consignor. Thus, in *Craig & Rose v. Delargy*, 1879, 6 R. 1269, the purchaser of a cargo of oil, 15 tons of which had been lost owing to insufficient casks, where the bill of lading bore that the casks had been shipped in good order, and also the additional words, "not responsible for leakage," was unsuccessful in an action of damages against the shipowners, on the ground that the purchaser as onerous holder of the bill of lading could have no higher right than the shipper, whose provision of insufficient casks had caused the loss.

CHAPTER IV.

MERCHANT SHIPPING.

MERCHANT SHIPPING ACTS, 1894 to 1914.—The rules of law relating to shipping are principally contained in these statutes, the most important of which is the Merchant Shipping Act, 1894. That Act consolidated the enactments relating to the subject. It extends to 748 sections, with many important schedules annexed. It has been amended by statutes passed in 1897, 1898, 1900, 1906, 1907, 1911, 1913, and 1914. The most important of these amending statutes is the Merchant Shipping Act of 1906. The Maritime Convention Act, 1911, has made considerable alteration on the law of liability in cases of collision. The Pilotage Act, 1913, also codifies the law of pilotage and repeals the sections of the Merchant Shipping Acts dealing with that subject. The Merchant Shipping (Convention) Act, 1914, gives effect to an International Convention for the safety of life at sea. The statutes are construed together and are referred to as the Merchant Shipping Acts, 1894 to 1914.

BRITISH SHIP.—Under the 1894 Act a ship is not deemed to be a British ship unless it is owned wholly by British subjects, either natural born or naturalised, or by bodies corporate established under and subject to the laws of some part of His Majesty's dominions, and having their principal place of business in those dominions. It is thus not the place of building that determines whether a ship is British or not. Ownership is the determining factor. An alien cannot own any share in a British ship.

REGISTRATION.—Every British ship must be registered. The only exceptions are certain river boats or coasters,

not exceeding 15 tons burden, and certain Canadian boats not exceeding 30 tons burden.

Before registry the name of the ship must be permanently and conspicuously marked on her bows, and her name and the name of the port of registry must be marked on her stern on a dark ground in white or yellow letters, or on a light ground in black letters, such letters to be not less than 4 inches long. Her official number and the number denoting her registered tonnage must be cut on her main beam. A scale of feet denoting her draught of water must be marked on each side of her stern post and stem in Roman capital letters or in figures not less than 6 inches long. There must be produced to the Registrar a surveyor's certificate specifying tonnage, build, and all other particulars for identification required by the Board of Trade, and in the case of a first registry a builder's certificate is also required.

The application for registration must be made by one or more of the owners, or their duly authorised agent, at any port within the British dominions. The applicants must make a declaration stating the nature of their qualifications as owners, time and place of building, master's name, and other particulars required by statute.

The particulars are entered in the register book by the Registrar, who, on all the requirements being complied with, grants a certificate of registry.

The certificate of registry contains the particulars respecting the ship entered in the register book, with the name of her master.

OWNERSHIP.—The property in a ship is divided into sixty-four shares. Not more than sixty-four persons may be registered as owners of one ship. No person can be registered as owner of less than one share; but any number of persons, not exceeding five, may be registered as joint owners of a ship, or of a share or shares therein. Such joint owners are considered as one person, and they are not entitled to dispose individually of any interest in

any ship, or in any share therein, in respect of which they are registered.

A corporation may be registered as owners in its corporate name.

Notwithstanding these rules, any beneficial or equitable interest of any persons or company may be enforced against registered owners and mortgagees in respect of their interest in the ship.

Any change of ownership or change of master must be endorsed on the certificate.

BILL OF SALE.—A registered ship or any share therein must be transferred by bill of sale. The bill of sale contains the same description of the ship as is contained in the surveyor's certificate or some other description sufficient to identify the ship to the satisfaction of the Registrar. A form of bill of sale is given in the first Schedule annexed to the 1894 Act. It must be executed by the transferor in presence of, and be attested by, one or more witnesses. The transferee is not entitled to be registered as owner until he makes a declaration of transfer containing a statement of his qualification to own a British ship. The bill of sale, when duly executed, is produced to the Registrar along with the declaration of transfer. The Registrar enters in the register book the name of the transferee as owner, and endorses on the bill of sale the fact of that entry having been made, with the day and hour thereof. Bills of sale must be entered in the register book in the order of their production to the Registrar.

Provision is made by statute for transmission of ownership by death and bankruptcy and consequent registration.

MORTGAGE.—A registered ship or a share in one may be made a security for a loan or other valuable consideration. The instrument creating the security is called a mortgage, and a form of instrument is given in the first Schedule annexed to the 1894 Act. The Registrar of the

port at which the ship is registered must record mortgages in the register book in the order of time in which they are produced to him for that purpose. He must notify on the instrument of mortgage that it has been recorded by him, also the time and date of such record.

Mortgages are preferred according to the date at which each instrument is registered, not according to date of the instrument.

Every registered mortgagee has power absolutely to dispose of the ship or shares in respect of which he is registered. But if there are more persons than one registered as mortgagees of the same ship or shares, no subsequent mortgagee can, except under the order of the Court, sell such ship or shares without the concurrence of every prior mortgagee.

Provision is also made by statute for the transfer of mortgages by an instrument of transfer in a prescribed form. The Registrar, on production of the instrument, enters in the register book the name of the transferee as mortgagee, and notes on the instrument that it has been recorded. The discharge of a mortgage is also entered on the register.

SALVAGE.—Salvage is the compensation or reward allowed to persons by whose exertions a ship or cargo or life is saved from loss or damage at sea, provided the services rendered were voluntary and involved the exercise of skill and enterprise. In determining the amount of salvage payable, consideration must be given to the whole circumstances, including the degree of danger, the value of the property saved, the extent of the risk undertaken, amount of skill shown, and the time occupied. Salvage is due by those who receive the benefit and who would have suffered the loss but for the salvage services. The amount of salvage is apportioned amongst the owners and master of the crew of the vessel rendering the necessary services.

BOTTOMRY AND RESPONDENTIA.—In these days of rapid communication by post and telegraph, and of vessels driven by steam power, bonds of bottomry and respondentia are all but obsolete. Bottomry is a security whereby the ship or the ship and freight is hypothecated, *i.e.*, charged or made liable, for repayment of money borrowed for the necessary purposes of the voyage. The loan is repayable only in the event of the safe arrival of the ship at her destination. If the ship is lost the lender loses his money. The risk being great, the interest charged on the loan is usually high.

An owner now raises money by way of mortgage as above explained, instead of by bottomry bond, the security to the lender being more complete and the rate of interest lower. The power of the master to grant a bond of bottomry is subject to very strict limitations. Before doing so he must, if at all possible, communicate with the owners by telegraph or otherwise, and obtain their consent. Practically the only case where the master may have to raise money by means of a bottomry bond is where the vessel has had to put in at some distant foreign port, and is unable to proceed further without undergoing repairs and obtaining provisions for the crew. The loan must be absolutely necessary to enable the ship to prosecute the voyage, and it must have been impossible to obtain the money in any way less burdensome to the owners.

Respondentia is similar in its nature to the contract of bottomry, the difference being that in respondentia the cargo is hypothecated instead of the ship or the ship and freight.

In former days, before telegraphic communication was known or steam power introduced, these contracts were much more common.

MARINE INSURANCE and **SEA CARRIAGE** are dealt with at pages 124 and 86 respectively.

CHAPTER V.

PATENTS AND DESIGNS.

GENERAL.—A patent, in its widest sense, is a grant by the Crown made by letters patent (*litteræ patentēs*) or open letters, “so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom, and are usually addressed by the Sovereign to all the subjects of the realm” (Blackstone). Titles of honour, such as a peerage of the realm, appointments to certain public offices, and charters of incorporation are granted by letters patent. But the grant to which the term “patent” is in common usage restricted, and which we deal with here, is the monopoly of making, using, and selling new inventions.

The power assumed by the Crown of granting monopolies with regard to trade commodities came to be grossly abused, and was abolished in England by the Statute of Monopolies in 1623, which was extended to Scotland at the Union. Power was, however, reserved to the Crown by section 6 of the Statute of Monopolies to grant privileges for fourteen years or under “for the sole working or making of any manner of new manufactures, which others at the time of making such letters patent or grants shall not use, so as also they be not contrary to the law nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient.” This clause in the Statute of Monopolies is the basis of the modern patent law.

The principle underlying the granting of patents is to effect a compromise between the inventor and the public, to reward an inventor, and, at the same time, secure the

benefit of his invention for the public. The inventor is accordingly granted a monopoly for a fixed period on his disclosing the nature of his invention to the public.

The statute law relating to patents has been consolidated by the Patents and Designs Act, 1907, 7 Edw. VII. cap. 29, which repealed all the prior statutes with the exception of portions of the Statute of Monopolies. This has been followed by a Short Explanatory Act in 1908 and a short amending Act in 1914, and these statutes may be cited together as the Patents and Designs Acts, 1907 to 1914. The Act of 1907, being the principal Act, is referred to in this chapter as "the Act."

SUBJECT-MATTER.—The words above quoted defining what may be the subject of a patent have been construed by a vast number of important decisions. Broadly speaking, the alleged invention must be new, it must be useful, and it must have demanded ingenuity. It must be a new "manufacture," which includes a new process or method of manufacturing an old and well-known article. The discovery of a principle is not patentable.

Although an invention must be new and must not have been previously made known to the public, the Act provides that exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, or publication of a description of it or its use during the exhibition, does not, under certain conditions, prejudice the inventor's right to obtain a patent if application is made within six months from the opening of the exhibition.

IMPROVEMENTS ON PATENTS.—Patents may be taken out for improvements on existing patented inventions. The patent for the main invention is called the "master patent," and it may be followed by a number of patents for improvements. The later patentees cannot, however, make any use of the master patent without the licence of

the original patentee. Nor can the original patentee make use of any of the improvements without the licence of their owners.

WHO MAY APPLY.—Any person, whether a British subject or not, who claims to be the true and first inventor of an invention may apply for a patent. In the event of his death, application may be made by his legal representative. A joint application may be made, in which case the inventor must be one of the joint applicants.

The first importer of an invention from abroad is considered the true and first inventor, and is entitled to a patent. The most frequent use of this rule is for a foreign inventor to instruct his patent agent in this country to take out a patent. The agent takes out the patent in his own name, but in reality holds it as trustee for his client.

Section 91 of the Act provides that an inventor who has applied for protection in a State with which we have entered into international arrangements for mutual protection of inventions is entitled to a patent in this country in priority to other applicants if he applies within twelve months from the date of the application in that State. This right has, by the 1914 Act, been extended to the inventor's legal representatives and assignees. A similar arrangement exists with certain of our colonies. The date of the patent will be the same as the date of application in the foreign State or colony.

HOW TO OBTAIN A PATENT.—An application in a prescribed form must be lodged at the Patent Office in London. It must be accompanied by either a provisional or complete specification. A provisional specification describes the nature of the invention, without entering into details. A complete specification describes in detail the nature of the invention and how it is to be performed, and must end with a distinct statement of the invention

claimed. The Comptroller may also require suitable drawings to be supplied. In the case of a chemical invention, he may require typical samples and specimens to be furnished.

The Comptroller (*i.e.*, the Comptroller-General of Patents, Designs, and Trade Marks) refers every application to an examiner, and, on receiving his report, may refuse to accept the application or require that the application, specification, or drawings be amended, his decision being subject to review by the law officer. When an application is accepted, the Comptroller sends notice of acceptance to the applicant.

If the applicant does not leave a complete specification with his application, he may do so within six months. An extension of time (not exceeding one month) is granted by the Comptroller on payment of the prescribed fee. Unless a complete specification is so left the application is deemed to be abandoned.

Where a complete specification is left after a provisional specification, the Comptroller refers both specifications to an examiner. If on the report of the examiner the Comptroller refuses to accept the complete specification, his decision may be appealed to the law officer. Unless a complete specification is accepted within twelve months from the date of the application, the application (except where an appeal has been lodged) becomes void. An extension of time, not exceeding three months, is granted by the Comptroller on payment of the prescribed fee.

The examiner makes an investigation to ascertain whether the invention has been wholly or in part claimed or described in any specification lodged within fifty years before the date of application. If any such prior claim or description is found, the applicant is informed and given an opportunity to amend his specification, but if the Comptroller is satisfied that the invention has been wholly and specifically claimed in any such prior specification he

may refuse to grant a patent. An appeal lies from his decision to the law officer.

On the acceptance of the complete specification the Comptroller advertises the acceptance, and the application and specifications, with the drawings (if any), are then open to public inspection.

At any time within two months from the date of this advertisement any one may give notice of opposition to the grant of the patent on any of the following grounds:—

- (a) That the applicant obtained the invention from him or from a person of whom he is the legal representative; (b) that the invention has been claimed in a complete specification for a patent of prior date lodged within fifty years before the date of application; (c) that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the complete specification; or (d) that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification.

If there is no opposition, or if the opposition is unsuccessful, a patent sealed with the seal of the Patent Office is granted to the applicant on payment of the prescribed fee.

A patent is sealed as soon as may be and not after the expiration of fifteen months from the date of application, except in special circumstances, such as where extension of time has been allowed for lodging complete specification, or where delay has been caused by appeals or by opposition.

A patent is, as a rule, dated and sealed as of the date of the application; but no proceedings may be taken in respect of an infringement committed before the publication of the complete specification.

TERM OF PATENT.—The duration of a patent is fourteen years from its date.

A patent ceases if the patentee fails to pay the prescribed fees within the prescribed times, but, on receipt of an additional fee, the Comptroller may extend the time for three months, but not more.

A patentee may, after prescribed advertisement, present a petition to the Court for an extension of his patent for a further term. The petition must be presented at least six months before the expiration of the fourteen years. Any person may, on giving notice, object to such extension, and the Comptroller is also entitled to appear and be heard. If it appears that the patentee has been inadequately remunerated by his patent, the Court may extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or may order the grant of a new patent for such term, and containing such restrictions, conditions, and provisions as the Court may think fit.

RESTORATION OF LAPSED PATENTS.—Where a patent lapses through non-payment of fees, an application may be made to the Comptroller for restoration of the patent. The application must be advertised, and restoration may be opposed. The Comptroller, after hearing parties, may, subject to an appeal to the Court, restore the patent or dismiss the application.

AMENDMENT OF SPECIFICATION.—The Act contains provisions whereby an applicant or patentee may amend his specification. The proposed amendment must be advertised, and may be opposed. The decision lies with the Comptroller, subject to an appeal to the law officer. No amendment is allowed which claims an invention substantially larger than or substantially different from the invention originally claimed.

In an action for infringement of a patent or proceedings

before a Court for the revocation of a patent the Court may allow the patentee to amend his specification by way of disclaimer.

COMPULSORY LICENCES AND REVOCATION.—Any person interested may present a petition to the Board of Trade alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied, and praying for the grant of a compulsory licence, or, in the alternative, for the revocation of the patent. If satisfied that a *prima facie* case has been made out, the Board of Trade will refer the petition to the Court, and, if not so satisfied, they may dismiss the petition. The Court may order the patentee to grant licences, or they may revoke the patent, but an order of revocation may not be made before the expiration of three years, or if the patentee gives satisfactory reasons for his default.

Revocation of a patent may be obtained on petition to the Court. In Scotland the proceedings are in the form of an action of reduction in the Court of Session at the instance of the Lord Advocate, or at the instance of a party having an interest with his concurrence, which concurrence may be given on just cause shown only.

Any person who would have been entitled to oppose the grant of a patent or his successor in interest may within two years from the date of the patent apply to the Comptroller to revoke the patent on any of the grounds on which the grant might have been opposed. The Comptroller's decision is subject to appeal to the Court.

Four years after the date of the patent any person may apply to the Comptroller for the revocation of the patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom. Unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in the United Kingdom, or gives satisfactory reasons why this is not so, the patent may be

revoked either forthwith or after such reasonable interval as may be specified, the decision of the Comptroller being subject to appeal to the Court.

CROWN.—A patent has the like effect as against His Majesty the King as it has against a subject. But any Government department may use the invention for the services of the Crown on such terms as may be agreed on, with the approval of the Treasury, or, failing agreement, as may be settled by the Treasury. Provision is also made in the Act to enable the inventor of any improvement in instruments or munitions of war to assign the benefit of it to the Secretary of State for War or the Admiralty, and for keeping secret all particulars with regard to the nature of it and the manner of working.

ASSIGNMENTS AND LICENCES.—A patent right may be transferred by assignment. The whole patent may be assigned or the right for a limited area only. An assignment may also be by way of mortgage. An assignee may sue infringers in his own name. A mortgagee, however, cannot do so, this right remaining in the mortgagor.

A patentee may also transfer rights in his patent by the grant of licences. In granting a licence a patentee does not part with his whole interest, but merely grants to the licensee a right to make or to use the patent for the whole or part of the term of the patent. A licence may be exclusive, general, or limited. A licensee cannot sue infringers in his own name.

In an assignment or licence there is no implied warranty of the validity of the patent. If such a warranty is intended it must be expressly stated.

REGISTER OF PATENTS.—A book called the Register of Patents is kept at the Patent Office. In it there are entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of

patent, of licences under patents, and of amendments, extensions, and revocations of patents, and all such matters affecting the validity or proprietorship of patents.

INFRINGEMENT OF PATENT.—The grant of a patent prohibits all others than the patentee from making use of the invention or putting it in practice without his consent or licence. Any one doing what is thus prohibited infringes the patent. The patentee may raise an action against the infringer for damages and for interdict restraining him from further using the invention. The defence may be either that the patent is invalid, or that there has been no infringement. To establish the invalidity of the patent objection may be taken to the form of the letters patent or of the specification, or it may be shown that the invention was not a proper subject for a patent, that the patentee was not truly the inventor, that there had been “prior use” or publication, &c. The other defence, that there has been no infringement, is a question of fact. There must be a substantial imitation of the invention. It is immaterial that the person did not intend to infringe or that he did not know of the patent.

DESIGNS.—The law dealing with the registration of designs and copyright in these designs is now contained in the Patents and Designs Act, 1907. A design in the sense of the Act means “any design (not being a design for sculpture or other thing within the protection of the Sculpture Copyright Act, 1814) applicable to any article of manufacture or to any substance artificial or natural, whether the design is applicable for the pattern or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidery, weaving, sewing, modelling, casting, embossing, engraving, staining, or

any other means whatever, manual, mechanical, or chemical, separate or combined." On the application of the owner of any new or original design not previously published in the United Kingdom, the Comptroller may register the design. The same design may be registered in more than one class of articles. If the Comptroller refuses to register, an appeal may be taken to the Board of Trade. The Register of Designs is kept at the Patent Office.

The registered owner has copyright in the design for five years, that is, he has the exclusive right to apply the design to any article in any class in which the design is registered. On application within the prescribed time and on payment of the prescribed fee the copyright is extended for a second period of five years, and similarly, for a third period of five years.

Before delivery on sale of any article to which the design has been applied, a prescribed number of specimens of the design must be furnished to the Comptroller, and each article sold must be marked with the prescribed mark, words, or figures, denoting that the design is registered.

CHAPTER VI.

TRADE MARKS AND TRADE NAMES.

GENERAL.—At common law a trader could acquire a right to a trade mark by actual user, and could prevent another using that trade mark to his prejudice.

The first statute to deal with trade marks was the Trade Marks Registration Act, 1875, by which registration of trade marks was established. This Act and subsequent legislation on the subject have now been repealed, and the law has been consolidated and amended by the Trade Marks Act, 1905. The Trade Marks Act, 1914, is a short amending statute with regard to cotton marks. The two Acts may be cited together as the Trade Marks Acts, 1905 and 1914.

DEFINITION.—A trade mark is defined by the 1905 Act as “a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale,” and includes “a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof.”

By section 9 of the Act a trade mark to be registrable must contain at least one of the following essential particulars:—(1) The name of a company, individual, or firm represented in a special or particular manner; (2) the signature of the applicant for registration or some predecessor in his business; (3) an invented word or words; (4) a word or words having no direct reference to the character or quality of the goods, and not being, accord-

ing to its ordinary signification, a geographical name or a surname; (5) any other distinctive mark.

With regard to the third of these particulars, it has been held that such a word as "Uneeda" is not an "invented word" in the sense of the Act.

REGISTRATION.—A Register of Trade Marks is kept at the Patent Office. Registration is *prima facie* evidence of the exclusive right to the use of a trade mark, and after seven years is conclusive evidence of such right. No person is entitled to institute proceedings for infringement of an unregistered trade mark, unless it was in use before 13th August, 1875, and has been refused registration under the Act.

Application for registration must be made in writing in the prescribed manner to the Registrar, who may refuse it or may accept it absolutely or subject to conditions, amendments, or modifications. In case of refusal or conditional acceptance the Registrar may be required by the applicant to state in writing the grounds of his decision and the materials used by him in arriving at that decision, and an appeal may be taken by the applicant to the Board of Trade or to the Court.

When an application has been accepted absolutely or subject to conditions it must be advertised by the Registrar.

Any person within the prescribed time after advertisement may give notice of opposition in writing to the Registrar. The notice must include a statement of the grounds of opposition. An opportunity is then given to the applicant to send a counter statement of the grounds on which he relies for his application. The Registrar, after hearing parties, if required, and considering the evidence, decides the matter, and his decision is subject to appeal to the Court or to the Board of Trade.

The trade mark, when registered, is registered as of the date of the application.

A certificate is issued to the applicant under the hand of the Registrar, and sealed with the seal of the Patent Office.

ASSIGNMENT.—A trade mark when registered may be assigned or transmitted only in connection with the goodwill of the business concerned in the goods, and is determinable with that goodwill. When a business with the trade mark is so assigned, the assignee should apply to the Comptroller to alter the register.

PERIOD OF PROTECTION.—The registration is for a period of fourteen years, and can be renewed every fourteen years.

TRADE NAMES.—An exclusive right in a trade name may occasionally be acquired apart from registration under the statute where the goods of a particular trader have by long use become known in the market by such name. Thus the words "Yorkshire Relish," though unregistrable as a trademark because geographical in nature, were held to be a trade name which could only be used by the manufacturers of the article long known to the public by that name (*Powell v. Birmingham Vinegar Brewing Company*, 1896, 2 Ch. 54). In *The Cellular Clothing Company, Limited v. Maxton & Murray*, 1899, 1 F. (H.L.) 29, a company failed to establish an exclusive right to use the word "cellular" in connection with their goods. Where, as in this case, the word is an ordinary English word, it is exceedingly difficult for a trader to appropriate it exclusively for his own goods. He would require to prove that the word had been so universally recognised by the trade and the public as denoting his goods that its application to other goods involved misrepresentation.

PASSING OFF.—A trader is not entitled to represent that the goods which he sells are the goods of a different

trader to the injury of the latter. He must not, by making use of a similar name or packet or mode of making up the article or otherwise, act in such a way as to induce the public to believe that the goods are the manufacture of some one else. Thus in the English case of *Edge & Sons v. Nicoll & Sons*, 1911, A.C. 693, the plaintiffs had for many years put on the market laundry blue and tints in little bags not marked with their name, but with a stick protruding, by the presence of which their goods were recognised by the public. The defendants exactly imitated the get-up of the plaintiffs' goods except that they attached to the bags a label bearing their name. The plaintiffs were successful in an action to restrain the defendants from passing off their laundry blue as the plaintiffs' by imitating the get-up of the plaintiffs' goods.

Again, where corsets made by Bayer had acquired a trade reputation under the name or mark of "C.B.," and another trader, Baird, proceeded to sell corsets of a different manufacture under the name of "C. B. & Co.," so written as to be easily mistaken for the marking used by Bayer, and to have the effect of deceiving the public, interdict was granted against Baird continuing to use the mark "C. B. & Co." (*Bayer v. Baird*, 1898, 25 R. 1142).

MERCHANDISE MARKS ACTS, 1887 to 1911.—The Act of 1887 consolidated and amended the law relating to fraudulent marks on merchandise. The following are some of the acts declared offences by this statute:—To forge any trade mark, to apply falsely to goods any trade mark, and to apply any false trade description to goods. Every person guilty of an offence against the Act is liable to imprisonment or to fine, or in some cases to both, and in any case to forfeit every article by which the offence has been committed. All goods of foreign manufacture bearing the name or trade mark of any

manufacturer or trader in the United Kingdom must be accompanied by a definite indication of the country in which the goods were made or produced. The Act of 1891 is a short amending statute, and confers powers on the Board of Trade to prosecute in certain cases. A similar power of prosecution is conferred on the Board of Agriculture by the Act of 1894. The Act of 1911 authorises the proper officer of Customs and Excise to require the importer of goods bearing fraudulent names or marks to produce documents relating to the goods and furnish information as to the person who consigned the goods and the person to whom the goods were sent in the United Kingdom.

CHAPTER VII.

LIFE ASSURANCE.

DEFINITION.—Life assurance is a contract in which the assurer (generally a company) agrees to pay a certain sum of money (with or without additions by way of bonus) on the death of the assured, or on the attainment by him of a certain age. The consideration is usually the payment of an annual premium during life, or during a certain number of years; sometimes it is a single payment. The terms of the contract are set forth in the policy, which must be stamped.

THE PROPOSAL.—The first step in effecting a policy of life assurance is to fill up a proposal form. This contains a number of inquiries as to the health, habits, and antecedents of the proposer. The answers must be made with the greatest care, and every fact known to the proposer which is material to the risk must be disclosed. A declaration is signed that the statements contained in the proposal are true and are to form the basis of the contract. If any of the statements are not true the policy is void. For example, A made a life proposal containing the usual declaration to an insurance company. The proposal form contained the following queries:—“(a) Are you temperate in your habits? (b) and have you always been strictly so?” to which A answered (a) “Temperate”; (b) “Yes.” After A’s death it was held that the company was entitled to refuse payment of the policy on the ground that the above answers were untrue (*Weems v. Standard Life Assurance Company*, 1884, 11 R. (H.L.) 48).

It ought to be kept in view that, as the statements are in the nature of a warranty, an untrue statement makes the policy void, whether the assured knew it to be untrue or not.

Before acceptance the company usually obtains a report of an examination made by their own medical officer, and also reports from two intimate friends of the proposer.

INSURABLE INTEREST.—A person may insure his own life for as large a sum as he cares, but he cannot insure the life of another person unless he has some interest in that other person's life. An Act was passed in 1774 to prevent speculative and gambling insurances, and requiring an interest by the proposer in the life offered for insurance. Prior to that Act these speculative insurances on other people's lives had become a source of public danger. The insurable interest must be of a pecuniary character, and must exist at the time the policy is effected.

A creditor has an insurable interest in the life of his debtor, and may thus insure his life; this right to insure his debtor's life is not affected by his holding in addition some real security for the debt. But he cannot insure his debtor's life for a sum beyond the amount of his insurable interest. Thus if the amount of the debt is £200, the creditor cannot insure the life of the debtor for £500. He can only insure it for the amount of the debt with a margin for interest, if payment of interest is part of the agreement. A creditor may keep a policy in force and secure its ultimate benefit although the debt may have been paid up, provided the debt existed at the time the policy was effected. Thus the important point is that there was an insurable interest when the contract of assurance was entered into. Subsequent events do not affect its validity. *E.g.*, A owes B £500, and B insures A's life for that amount. At the end of five years A repays B. B may continue to pay the premiums and

keep the policy in force, and is entitled to payment of the proceeds on A's death.

A partner has an insurable interest in the life of his co-partners.

An employee may insure the life of his employer, but not beyond the capital value of the salary for the period of service contracted for.

A cautioner for another may insure that other's life to protect the liability which he has incurred. He may also insure the life of a co-cautioner.

Relationship alone is not sufficient to constitute an insurable interest. By statute (see *infra*) a wife may effect an assurance on her husband's life in her own name. It has been assumed, though not expressly decided, that a husband has an insurable interest in his wife's life. It appears also to have been assumed that a parent has no insurable interest in the life of his child nor a child in the life of his parent, but, in view of the obligation on a child to maintain his parent, it has been suggested that a parent has an insurable interest in his child's life.

MARRIED WOMEN'S POLICIES OF ASSURANCE (SCOTLAND) ACT, 1880.—Under this Act a wife may effect a policy of assurance on her own life or on the life of her husband for her separate use. Such a policy vests in her exclusive of the *jus mariti* and right of administration of her husband.

The Act further provides that if a married man takes out a policy expressed to be for the benefit of his wife or of his children, or of his wife and children, the policy is not subject to his debts. It is treated as a trust on their behalf, and the man's creditors cannot touch it. But if it be proved that the policy was effected and the premiums paid with intent to defraud creditors, or if the assured be made bankrupt within two years from the date of the policy, the creditors may claim repayment of the premiums so paid out of the proceeds of the policy.

TRANSFER.—By the Policies of Assurance Act, 1867, the rights of the assured are assignable by indorsement on the policy or by a separate instrument in the following form given in the Act:—"I, A B, of, &c., in consideration of, &c., do hereby assign unto C D, of, &c., his executors, administrators, and assigns, the (within) policy of assurance granted, &c. (here describe the policy). In witness, &c." The assignment must be duly stamped.

Written notice of assignment must be given to the assurance company at their principal place of business. The date on which the notice is received by the company regulates the priority of claims. The company, at the request in writing of the person giving the notice, and on receipt of a fee not exceeding 5s. (which some companies do not exact), must deliver an acknowledgment in writing of the receipt of the notice signed by a principal officer.

CHAPTER VIII.

FIRE INSURANCE.

DEFINITION AND NATURE OF CONTRACT.—A contract of fire insurance is a contract whereby the insurer undertakes, in consideration of the premium paid, to make good to the insured any loss or damage caused by fire to a particular property during a specified time, not exceeding a fixed amount. It is purely a contract of indemnity. Thus, the insured may not make a profit out of a fire, but is merely indemnified against loss. The sum mentioned in the contract is not the measure but the limit of the amount that may be recovered.

The terms and conditions of the contract are contained in the policy, which must bear a penny stamp.

Sometimes a covering note is issued, which gives provisional protection until the policy is executed, or until the insurance company has determined whether to accept or decline the risk.

INSURABLE INTEREST.—A person can only insure property against fire to the extent of his interest in that property. The interest is not necessarily as proprietor. A trustee, for example, may insure the property belonging to the trust estate under his charge. A creditor may insure property on security of which he has lent money. A pawnbroker may insure the goods which are pledged with him. A warehouseman may insure all goods that may be in his warehouse, where he is responsible to the owners of the goods for their safety by contract, usage, or course of dealing.

The interest must exist both at the date of the contract and also at the date of the loss. If the insured property is sold the insurance lapses. To enable the purchaser to get the benefit of the insurance policy, it must be endorsed by the insuring company to the effect that the interest in the property is vested in the purchaser. Missives of sale usually pass between the parties in the case of a sale of a heritable property some time before the formal conveyance of the property is executed, and before the purchaser takes possession. It is held in England that, in the event of a fire in the interval, the purchaser is not entitled to any abatement from the price. This point has not been decided in Scotland, but it is the practice to obtain an indorsement of the policy in favour of the purchaser when the missives are completed, or to take out a new insurance policy in favour of the purchaser.

THE PROPOSAL.—In making a proposal for insurance the utmost good faith and complete disclosure of all material facts are required. The greatest care must be taken to describe the property accurately, so that the company may have full knowledge of the risk involved. A mis-description of the risk in a material point, though innocently made, frequently vitiates the policy. For instance, an insurance was effected on a warehouse on the same day that a fire had occurred in a boatbuilder's yard, separated from the warehouse by one other building only. The fire was apparently extinguished before instructions were given for insurance of the warehouse, but two days afterwards fire again broke out in the boatbuilder's yard and spread to the warehouse, where damage was done. It was held that the insured could not recover under the policy, because they had not communicated to the insurance company that a fire had occurred in the boatbuilder's premises, and that thus full disclosure of all material facts had not been made to the company (*Bufe*, 1815, 6 Taunt. 338).

VARIETIES OF INSURANCE.—If a building worth £2000 is insured for £500 only, and there is a loss by fire to the extent of £500, that sum is payable to the insured, where the policy is in the usual terms. This is called a specific fire policy, because the property is insured for a specific amount. If the loss had amounted to £800, the extent of the loss beyond the amount contained under this policy, namely, £300, would fall upon the insured himself. There is a temptation under such a policy, for the sake of a small premium, to insure a property much below its value. The company get a smaller premium, and are more liable to be called upon to pay the full amount of insurance, as a partial loss is more frequent than a total loss. At the same time the insured incurs the risk of serious loss.

In certain classes of risks an average clause is frequently inserted in the policy, and the effect of it is that, in the event of loss, the company will pay only the proportion of the loss which the amount of insurance bears to the value of the property insured. Average policies are, as a rule, issued in the insurance of goods stored in more than one building, farm stock, and similar risks. Thus, if a stock worth £2000 is insured under an average policy for £500 only, or one-fourth of its value, and damage by fire amounts to £500, the company would only pay £125, one-fourth of the loss.

When goods are stored in different places and insured under one sum for one premium, the policy issued is called a "floating" policy. Under such a policy a merchant may insure £20,000 on goods in a number of different warehouses, when the quantity in each varies from day to day owing to sales and purchases, the insurance "floating" with the changing circumstances. All floating policies have an average clause.

A valued policy, although comparatively rare in this country, is common in America, where it has led to much fraud and litigation. The parties agree as to the value

of the property, which constitutes the measure of the liability of the company. If under such a policy property is insured for £1500, the company cannot contend in the event of loss that it was only worth £1000.

DURATION OF POLICY AND DAYS OF GRACE.—The exact point of time at which the insurance expires is invariably stated in the policy, *e.g.*, “4 p.m. of the twenty-fifth day of March, 1911.” Fifteen days of grace are usually allowed for payment of the renewal premium in the case of policies for a period not less than a year. If a fire occur during the days of grace the insured should at once tender the amount of the premium, as the company would not be bound to set off the premium as against the claim.

TRANSFER OF POLICY.—The contract is purely a personal one between the insured and the company. Hence, if the property itself is transferred, the transferee has no right to the insurance unless the company specially consent to a transfer of the policy. Their consent is indicated, as a rule, by an indorsement to that effect written on the policy by the company.

ALTERATION OF RISK.—The insured ought not to alter a particular risk without leave of the insurer. Any increase of risk vitiates the policy at once. A slight alteration which does not increase the risk may be allowed; for example, where the nature of insured premises is not thereby changed.

If articles are described in a policy as being in a particular place and they are afterwards removed to another place, the original insurance is void, as there has been a material alteration in the terms of the contract.

The proper course is to intimate any alteration to the insurance company at once and get them to put a memorandum upon the policy agreeing to the alteration, so that no question may be afterwards raised in the event of a fire.

RISK INSURED AGAINST.—The risk covered by a fire policy is loss or damage caused by fire. This includes the natural and necessary consequences of fire, such as damage caused by water used to extinguish the fire, removal of goods, and destruction of building to prevent the spread of the fire.

The policy expressly states that it does not cover certain risks. Among the excepted risks, some of the most common are the following:—Deeds, bills of exchange, money, books of account, documents of title, &c.; damage caused by any heating process or spontaneous fermentation or heating; damage caused by earthquake, subterranean fire, hurricane, invasion, foreign enemy, hostilities, riot, civil commotion, or military or usurped power.

The rents that would have been derived from property if it had not been burned, and also the business profits that would have been made had it not been for the fire may be insured. But these are not covered by a policy in general terms insuring the premises, and, if intended to be insured, must be expressly mentioned.

ADJUSTMENT OF LOSS.—On the occurrence of a fire, notice should at once be sent to the company, who will, as a rule, make an official inspection of the extent of the damage. The insured must be prepared to substantiate all claims for loss by reasonable evidence and explanations, such as the production of vouchers.

The contract of insurance, as already mentioned, is one of indemnity. The amount of the claim is thus based upon the value of the property at or immediately before the fire. Thus, furniture is bought for £500 and insured for that amount. The insurance is continued in force for ten years, when the furniture is completely destroyed by fire. If the value of the furniture, through tear and wear, is only £250 at the time of the fire, then the insured is entitled to recover no more than £250. He is

only entitled to be indemnified for actual loss and no more. There is thus no advantage in over-insuring.

If there should be more than one fire during the currency of the policy, the insurance company is not liable in the aggregate for more than the original sum insured. For example, a property is insured for £800 for one year, and the company has to pay a loss of £400 at the end of the first month. If there is another loss to the extent of £600 at the end of the ninth month, the company is liable for no more than £400, being the balance of the original amount insured.

The conditions of the policy usually provide for the settlement of any differences between the insured and the company as to any claim for loss by referring the question to arbitration. The adjustment of losses, unless they are of a very trivial nature, is usually carried out by a trained and skilled assessor of claims.

When more than one company have insurances over the same property, the loss is apportioned amongst the various companies in the ratio of the several sums insured. Thus, if a property is insured with A company for £500, and B company for £1000, and C company for £1500, and there is a loss by fire to the extent of £600, the loss is apportioned as follows:—A company pays £100, B company £200, and C company £300.

In most policies the company stipulates that it may, in its option, replace or reinstate the property damaged or destroyed instead of paying the amount of loss.

Upon payment of the loss, the company is entitled to be put in the place of the insured, and to get the benefit of all the means open to him for diminishing the loss. This naturally follows from the principle of indemnity. Where an insurance company has paid a loss to a landlord, but the tenants replaced the damage in accordance with an agreement to that effect, the company were held entitled to get back the money paid. If the damage has been caused by the wrongful act or default of a third

party, the company, on paying the loss, may sue the wrongdoer and use the insured's name for the purpose.

TARIFF AND NON-TARIFF COMPANIES.—The principal companies transacting fire insurance business belong to the Fire Offices' Committee, an association which fixes and publishes minimum rates for different classes of risks. These tariff companies, for their mutual protection and to obviate destructive competition, agree not to accept these risks upon reduced terms. Non-tariff companies do not bind themselves to this classification of risks, and profess to estimate each risk on its merits.

CHAPTER IX.

MARINE INSURANCE.

GENERAL.—The statute law on the subject of marine insurance has been codified by the Marine Insurance Act, 1906. Marine insurance is a contract of indemnity against marine losses.

The insurers are usually termed *underwriters*, as each of them subscribes his name to the policy stating the sum for which he agrees to become liable.

POLICY.—The contract must be embodied in a marine policy, which may be executed either at the time when the contract is concluded or afterwards. The policy must be properly stamped, and must specify—(1) The name of the assured or some person who effects the insurance on his behalf; (2) the subject-matter insured and the risk insured against; (3) the voyage, or period of time, or both, as the case may be, covered by the insurance; (4) the sum or sums insured; and (5) the name or names of the insurers.

A form of policy, which may be used, is given in the first Schedule of the Act, along with rules for the construction of a policy in the statutory or similar form.

SLIP.—In practice a memorandum called a “slip” is previously prepared by an insurance broker for the purpose of obtaining the consents of underwriters to the proposed insurance. Each underwriter appends to this slip the amount which he is prepared to accept and adds his initials. This simply serves as the basis of the contract, and is binding in honour only.

KINDS OF POLICIES.—A *valued* policy specifies the agreed value of the subject insured. The value fixed by the policy is conclusive between the parties as to the amount of risk. This policy is usually employed in the insurance of ships and freights.

An *open* or *unvalued* policy does not specify the value of the subject insured, but, subject to the limitation of the sum insured, leaves the value to be subsequently ascertained. This is the usual policy in insuring goods.

A *voyage* policy insures for a voyage or voyages; a *time* policy for a definite period of time. A contract for both voyage and time may be included in the same policy. A time policy may not be made for longer time than twelve months; but it may have a continuation clause to the effect that in the event of the ship being at sea or on a voyage when the policy expires, it is to remain in force until the arrival of the ship, and not more than thirty days thereafter (Finance Act, 1901, section 11).

A *floating* policy describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declarations. These declarations are made in the order of despatch or shipment, and comprise all consignments of goods within the terms of the policy. The value of the goods or other property must be honestly stated. A floating policy is usually on goods.

INSURABLE INTEREST.—The insured must have an insurable interest in the subject insured at the time of the loss. He must be interested at the time of the loss, though he need not be interested when the insurance is effected. If the property is insured “lost or not lost” he may recover, although he may not have acquired his interest until after the loss, unless at the time of insuring the insured was aware of the loss and the insurer was not.

A partial interest of any nature is insurable. The lender of money on bottomry or respondentia may insure

for the amount of his loan, a mortgagee for the sum due or to become due under his mortgage, the master or any member of the crew for wages.

A defeasible interest and a contingent interest are both insurable.

An insurance by way of gaming or wagering is void. By the Marine Insurance Gambling Policies Act, 1909, a person effecting an insurance, without any *bona fide* interest or a *bona fide* expectation of acquiring such an interest, is guilty of a criminal offence.

DISCLOSURE AND REPRESENTATIONS.—Marine insurance is *uberrimæ fidei*. The contract is based upon the utmost good faith. If good faith be not observed by one party, the other may avoid the contract. The insured must disclose every material circumstance known to him, that is, every circumstance which would influence the judgment of a prudent insurer in fixing the premium or determining whether to take the risk. Every material representation made by the insured must also be true.

WARRANTIES.—A warranty is an undertaking or assertion on the part of the insured on the fulfilment or truth of which the contract depends. It is a condition which must be exactly complied with, whether it is material to the risk or not. Breach of warranty discharges the insurer from liability.

A warranty may be express or implied. Express warranties are set forth in the policy, and usually refer to the time of sailing, the safety of the ship at a certain time, her departure with convoy, neutrality of the property in time of war, and freedom from seizures in port.

A warranty is implied in a voyage policy that the ship is seaworthy for the purpose of the voyage, also that she will not, without lawful excuse, deviate from the course of the particular voyage.

TOTAL AND PARTIAL LOSS.—A loss may be either total or partial. A total loss may be either actual or constructive. An actual total loss occurs where the property is totally destroyed, or the insured is irretrievably deprived of it. Where a ship is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

A constructive total loss occurs where the property is not destroyed, but its destruction seems unavoidable, or where the cost of preserving the property would exceed its value when preserved.

In the case of an actual total loss no notice of abandonment need be given to the underwriters, but such notice must be given in the case of a constructive total loss. The notice ought to be given as soon as possible, so as to enable the underwriters to obtain as much benefit as possible from the property. The notice is usually, although not necessarily, in writing. Abandonment transfers the whole property to the underwriters. What may remain of such property to the underwriters is called salvage.

The amount of indemnity in case of total loss is determined according to the policy, which may be valued or unvalued, as already explained.

When the loss is partial, the extent of the damage must be ascertained and the amount of indemnity is determined by well recognised rules. Where ship is partially damaged, the amount payable is usually only two-thirds of the cost of repairing, as the insured has the benefit of new materials for old.

Any extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of peril in order to preserve the property imperilled in the common adventure is called a general average act. A loss so caused is called a general average loss. The party on whom the loss falls is entitled to a rateable contribution from the other parties interested called a general average contribu-

tion. In the case of a general average sacrifice, the insured may recover from the insurer the whole loss without having enforced his right of contribution from the other parties; and where the insured has incurred a general average expenditure, he may recover from the insurer the proportion of the loss which falls upon him. Where the insured has paid or is liable to pay a general average contribution, he may recover same from the insurer.

A particular average loss is a partial loss caused by a peril insured against, which is not a general average loss, and which falls exclusively on the insured, giving him no right of contribution against others interested in the common marine adventure.

Salvage charges incurred in preventing a loss may be recovered under a marine policy.

ASSIGNMENT OF POLICY.—The policy may be assigned, unless it contains terms expressly prohibiting assignment. It may be assigned before or after loss. Where the policy has been assigned, so as to pass the beneficial interest in it, the assignee may sue upon it in his own name, and in such an action any defence may be stated, which might have been made, if the action had been brought at the instance of the original insured. The assignment may be made by indorsement on the policy or in other customary manner. An insured who has already parted with his interest without agreeing to assign the policy cannot subsequently make an assignment.

CHAPTER X.

BILLS OF EXCHANGE, CHEQUES, AND NOTES.

BILLS OF EXCHANGE ACT, 1882.—The law relating to bills of exchange, cheques, and promissory notes, with the exception of the rules relating to stamps, summary diligence, and prescription, is mainly regulated by the Bills of Exchange Act, 1882, 45 & 46 Vict. cap. 61. The sections referred to in this chapter are sections of this Act, unless otherwise indicated. The Act applies to the whole of the United Kingdom, and only in a very few points permits a difference between the law of Scotland and the law applicable to England and Ireland.

These documents are of great importance and value in commerce. We shall deal with them in the order followed in the statute under the separate heads of (1) bills of exchange, (2) cheques, and (3) promissory notes.

I.—Bills of Exchange.

THEIR ORIGIN AND USES.—The origin of bills of exchange is somewhat obscure, but there is little doubt that they arose out of the necessities of foreign trade, mainly to avoid the danger and difficulty of transmitting large sums of money in coin to and from distant places. Thus, A and B are two traders in this country, and C is a trader in Bombay. C owes A £1000; B owes C a similar sum. Instead of C sending cash to A and B to C, C draws a bill for £1000 on his debtor B, sends it to his creditor A, who obtains payment from B. The two transactions are thus settled without the transmission of cash to and from Bombay.

At first the use of bills of exchange was confined to trade with foreigners, but it was subsequently extended to transactions between merchants at home. Besides their utility in overcoming the necessity for the transmission of coin, their most important function to the trader has been in providing a convenient means of carrying on business on credit. A retail merchant buys £500 worth of goods from a wholesale firm, and, by granting a three months' bill, gets time to sell his stock before meeting the price. The creditor, on the other hand, in taking the bill from his customer, has obtained a most useful document of debt. He has his debtor fixed down to a definite date of payment, and he can, if it is inconvenient for him to be without the money, get the bill discounted by a banker or other capitalist, and thus obtain a sum equivalent to the debt (less a small discount) before the amount of the bill is due.

In the United Kingdom all persons, whether merchants or not, may now make use of bills for any lawful purpose. To-day the number of bills afloat must be enormous. Their popularity and usefulness are largely due to the many exceptional privileges which they enjoy.

✓**DEFINITION.**—A bill of exchange is defined in section 1 of the Act as “an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.” An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

✓**FORM OF INLAND BILL.**—There is no statutory form of bill of exchange. Latitude is thus allowed in framing the document, but it is advisable to adhere as closely as

possible to the usual form. The following is an example (with alternative terms in brackets) of an inland bill, *i.e.*, a bill drawn and payable within the United Kingdom, or drawn within the United Kingdom upon some person resident therein:—

£100.

Glasgow, 1st August, 1910.

Three months after date [*or* “on demand” *or* “at sight”] pay to me or my order [*or* “to bearer”], within the head office of the Bank of Scotland, Edinburgh, the sum of One hundred pounds sterling for value received.

William Williamson.

Mr. Thomas Thomson,
Merchant,
Edinburgh.

✓ PARTIES TO A BILL.—There are two parties to the above bill, namely, (1) the “drawer,” Williamson, the person who gives the order; and (2) the “drawee,” Thomson, to whom the order is addressed. The bill is said to be drawn upon Thomson. He expresses his intention of obeying the order by “accepting” the bill. If he accepts the bill he is called the “acceptor.” In the above example the drawer, Williamson, is himself the “payee,” in whose favour the bill is drawn, and to whom payment of the contents is to be made. Occasionally there are three parties, *e.g.*, where the bill runs “pay to Mr. John Johnson, or order,” Johnson in this case being the payee.

The payee transfers the bill by indorsation (*i.e.*, writing his name on the back of the document) and delivery (see Negotiation, p. 140), and is called an “indorser,” and the person in whose favour he indorses it is called an “indorsee.” A person in possession of the bill as payee or transferee is called a “holder” of it.

The bill may be made payable to “order” or to

“bearer.” A bill made payable to a person without the addition of the word “order” or “bearer” is deemed to be payable to that person or order; *e.g.*, “Pay to John Smith” is held to mean “Pay to John Smith, or order.” Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer (section 7 (3)).

✓ **A BILL MUST BE UNCONDITIONAL.**—A document in the following terms:— “On demand pay to A B, or order, the sum of £50 if the ship ‘Ocean King’ arrives safe at Aberdeen,” is not a bill of exchange, because it is not unconditional. Section 3 (3) expressly states that “an order to pay out of a particular fund is not unconditional” within the meaning of the Act; but “an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.” Thus, “Pay to A B or order the sum of £50 out of the proceeds of the sale of my stock” is, in the sense of the Act, not unconditional and is not a bill of exchange. But “Pay to A B or order the sum of £50, and deduct the amount from the proceeds of the sale of my stock,” is a bill of exchange, as it consists of an unqualified order to pay, coupled with an indication of a particular fund out of which the drawee is to reimburse himself, and is thus unconditional within the meaning of the statute.

✓ **A BILL MUST BE MADE PAYABLE ON DEMAND, OR AT A FIXED OR DETERMINABLE FUTURE TIME.**—“On demand” includes “at sight” or “on presentation.” What is a determinable future time? Section 11 provides that it may be (1) a fixed period after date or sight, or (2) the occurrence of a specified event, which is certain to happen, though the time of happening may be uncertain, or a fixed period thereafter. An instrument expressed to be payable on a contingency is not a bill, and the happening of

the event does not cure the defect. To illustrate, "Pay on my death" makes a valid bill, as the event is sure to happen. "Pay on my attaining the age of fifty" does not make a valid bill, as the event is a contingency. The drawer may never attain that age. It makes no difference if, as a matter of fact, he should attain that age. So an obligation to pay "when I am in good circumstances" is not a bill.

✓ **THE SUM PAYABLE MUST BE CERTAIN IN MONEY** (section 9).—It is quite competent for a bill to bear that a sum is to be paid (*a*) with interest; or (*b*) by stated instalments; or (*c*) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; or (*d*) according to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill. Where there is no stipulation as to interest, interest is payable at 5 per cent. from the *due date* of the bill.

The amount of the bill is generally indicated in figures in the top left-hand corner, and in words in the body of the bill. If there is any discrepancy in these amounts, the amount expressed in words is taken as correct.

✓ **DATE AND PLACE OF DRAWING OF BILL.**—The want of date does not invalidate a bill, but summary diligence (see p. 146) cannot proceed on an undated bill. If the date of bill is essential to fix time of payment, *e.g.*, "three months after date," any holder may fill it in (section 12). Place of drawing is usually mentioned, but not necessary.

✓ **THE PLACE OF PAYMENT OF BILL.**—The place of payment is frequently mentioned, as in the above example, though not essential.

✓ **"FOR VALUE RECEIVED."**—These or similar words are usually added, but are not necessary. In bill transactions

value usually has been given, but the bill is quite good although that is not stated. A bill may be granted without value, as a donation.

✓ **DAYS OF GRACE** (section 14).—It seems paradoxical to say that a bill payable on a fixed date is not payable when that date arrives, but such is the case. A bill dated 1st January, payable at three months, is not due on 1st April, but on 4th April. Three days, called “days of grace,” are added to the time of payment as fixed by the bill, and the bill is payable on the last day of grace. When the last day of grace falls on a Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving day, the bill is payable on the preceding business day. When the last day of grace is a Bank Holiday, or when the last day of grace is a Sunday and the preceding day a Bank Holiday, the bill is due on the succeeding business day.

When bills are payable “on demand” or “at sight” there are no days of grace. Note that days of grace are always added where bills are payable on a fixed date, unless the bills are expressed to be “without grace.”

✓ **CURRENCY OF BILL**.—The currency of a bill is the period from its issue till maturity. The currency of a bill at three months, dated and issued on 1st January, extends from that date to 4th April, the last day of grace. After that date, if the bill is unpaid, it is said to be overdue.

✓ **FOREIGN BILLS OF EXCHANGE**.—Any bill of exchange other than an inland bill above defined is a “foreign bill” (section 4). A foreign bill usually consists of a set of three bills in the same terms, except that each is separately numbered and bears to be payable only on condition that neither of the other two has been paid. These three documents are transmitted separately, and the risk of losing the bill is thus very much diminished. Any one of the set being paid, the others are of no use.

The following is a form of foreign bill:—

\$10,000.

Edinburgh, 1st August, 1910.

At thirty days after sight of the first of exchange (second and third unpaid) pay to the order of Mr. Robert Hearst ten thousand dollars, for value received, and place the same to account as advised.

George Wallace.

To Mr. Thomas Root,
New York.

A foreign bill is frequently made payable at one or more "usances." By "usance" is meant a time for payment fixed by custom as between the place where the bill is drawn and the place where it is payable.

The foregoing remarks with regard to the particulars of an inland bill apply equally to a foreign bill. The liabilities of drawer, acceptor, and indorser are governed by the laws of the countries in which drawing, acceptance, and indorsement respectively take place. The duties of a holder are determined by the law of the place where the act is to be done, and the due date depends on the law of the place where the bill is payable.

Except in a few points the laws of most commercial countries agree with those of the United Kingdom in regard to bills.

✓ **STAMPS ON BILLS.**—An inland bill must be stamped. This matter is regulated not by the Bills of Exchange Act, but by the Stamp Acts, and principally by the Stamp Act, 1891, 54 & 55 Vict. cap. 39.

When a bill (for any amount) is payable on demand or at sight or on presentation or within three days after date or sight, the stamp duty is 1d. In these bills, the fixed duty of 1d. may be denoted by an adhesive stamp, which must be cancelled by the person by whom the

bill is signed before he delivers it. If such a bill is presented for payment unstamped, the person to whom it is presented may affix a 1d. stamp and cancel the same as if he had been the drawer and may pay the sum mentioned in the bill, charging the duty against the drawer or deducting it from the sum paid (1891 Act, section 38). This provision, however, does not relieve any person from any fine or penalty incurred.

In all other cases, inland bills must be drawn upon paper impressed with the appropriate stamp duty, and cannot be stamped after execution (1891 Act, section 37). The stamp duty varies according to the amount of the bill.

When the amount does not exceed £5, the stamp duty is	-	-	-	-	-	-	-	-	-	-	1d.
Exceeding £5 and not exceeding £10,	-	-	-	-	-	-	-	-	-	-	2d.
„ £10	„	£25,	-	-	-	-	-	-	-	-	3d.
„ £25	„	£50,	-	-	-	-	-	-	-	-	6d.
„ £50	„	£75,	-	-	-	-	-	-	-	-	9d.
„ £75	„	£100,	-	-	-	-	-	-	-	-	1s.
For every £100 and also for every fractional part of £100,	-	-	-	-	-	-	-	-	-	-	1s.

When a bill is written on material bearing an impressed stamp of sufficient amount, but of improper denomination, it may be stamped with the proper stamp on payment of the duty and a penalty of 40s., if the bill is not then payable according to its tenor, or of £10 if it be so payable (1891 Act, section 37). Any person using a bill which is improperly stamped is liable to a penalty of £10, and the holder cannot recover on the document (1891 Act, section 38).

When foreign bills are negotiated in the United Kingdom they become liable to the same duties as above. If they are drawn in this country they must be stamped in the same way as inland bills. If drawn abroad they must be stamped by the holder before he can negotiate them in

the United Kingdom, and, in the latter case, he can use adhesive stamps, which he must affix and cancel.

✓ **ACCEPTANCE** (section 17).—As a bill is an order upon the drawee to pay, the first thing to do, as a rule, is to ascertain if the drawee will obey that order. The bill is accordingly sent to him for acceptance. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. It must be written on the bill and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. He usually signifies his acceptance by writing across the face of the bill the word “accepted,” and adding his signature. There are no special words necessary to indicate acceptance, and the mere signature of the drawee without additional words is sufficient. The drawee now becomes the acceptor.

✓ **GENERAL AND QUALIFIED ACCEPTANCES** (section 19).—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance varies the effect of the bill as drawn. In particular, an acceptance is qualified, which is (*a*) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition; (*b*) partial, *e.g.*, where a bill for £100 is “accepted to the extent of £75”; (*c*) local, *i.e.*, an acceptance to pay only at a particular specified place. “Accepted payable at Clydesdale Bank, Aberdeen,” is not considered a qualified acceptance; but if it is expressly stipulated that payment is not to be made elsewhere, it is qualified, *e.g.*, “Accepted payable at the Clydesdale Bank, Aberdeen, only”; (*d*) qualified as to time, *e.g.*, a bill drawn for three months may be accepted payable at six months; (*e*) the acceptance of some one or more of the drawees, but not of all.

The holder of a bill may refuse to take a qualified

acceptance and treat the bill as dishonoured by non-acceptance. Where a qualified acceptance is taken without the express or implied authority or the subsequent assent of the drawer or an indorser, they are discharged from liability on the bill. This does not apply to a partial acceptance of which due notice has been given. If the drawer or indorser receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he is deemed to have assented (section 44).

✓ **PRESENTMENT FOR ACCEPTANCE.**—The drawer may present the bill to the drawee for acceptance before he has himself signed it as drawer, and this course is frequently adopted in practice. Or, he may sign it first as drawer, and then present it for acceptance. Or, he may send it to the payee before acceptance, and the payee or any one to whom he may transfer it, *i.e.*, any holder, may present it to the drawee for acceptance. It is usual and advisable to present the bill to the drawee for acceptance as soon as possible.

Presenting a bill for acceptance has important effects in Scotland which it has not in England or Ireland. In Scotland presentment for acceptance operates as an assignation of funds belonging to the drawer in the hands of the drawee (section 53). Take an illustration. A draws a bill for £100 on B in favour of C. C presents the bill to B, but acceptance is refused. C might fall back upon A, but A becomes bankrupt. Assume B had £100 belonging to A in his hands; C claims that £100 as validly assigned to him instead of taking a dividend on A's estate.

Although it is advisable to do so, it is not necessary to present a bill for acceptance before the time fixed for payment, except in the following cases:—(1) Where a bill is payable at a certain time after sight, presentment is necessary in order to fix the maturity of the bill; and

(2) where a bill expressly stipulates that it shall be presented for acceptance or where it is payable elsewhere than at the drawee's residence or place of business. If the bill is payable elsewhere than at the drawee's residence or place of business, and the holder has not time, with the exercise of reasonable diligence, to present it for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting it for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers (section 39).

Presentment must be made at a reasonable hour on a business day and before the bill is overdue. If there are two or more drawees, who are not ~~parties~~ ^{partners}, presentment must be made to them all, unless one has authority to accept for all. Where the drawee is dead, presentment may be made to his personal representative. Where the drawee is bankrupt, presentment may be made to him or to his trustee. Where authorised by agreement or usage, a presentment through the post office is sufficient (section 41).

Presentment is excused and a bill may be treated as dishonoured by non-acceptance—(a) when the drawee is dead or bankrupt, or is a fictitious person, or has no capacity to contract by bill; (b) where, after the exercise of reasonable diligence, such presentment cannot be effected; (c) when, although presentment has been irregular, acceptance has been refused on some other ground. The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment (section 41).

When a bill is presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he does not, the holder loses his right of recourse against the drawer and indorsers (section 42). The drawee is entitled to the customary period, usually twenty-four hours, to make up his mind whether he will accept or

not. In reckoning the time non-business days are excluded (section 92).

A bill is dishonoured by non-acceptance—(a) when it is duly presented for acceptance, and acceptance is refused or cannot be obtained; or (b) when presentment for acceptance is excused, and the bill is not accepted. When a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary (section 43).

✓ **NEGOTIATION OF BILLS** (sections 31-38).—To negotiate a bill is to transfer it, so as to make the person to whom it is transferred the holder. A holder may always transfer, unless he is specially prohibited from doing so by words contained in the bill. A bill may be transferred by delivery alone or by indorsement and delivery, according to circumstances. If the bill is payable to bearer it is transferable by delivery. When the bill is made payable to "John Johnson" or to "John Johnson or order" and in the hands of Johnson as holder, it is negotiated by Johnson's indorsing and delivering it. It is evident that a bill payable to "A B or order" is much safer than one payable "To bearer," for, if the latter should be lost or stolen the finder or thief may transfer it. This cannot happen with the former, as no one can negotiate that bill but A B. Until he indorses it, it is of no use to any one.

Suppose John Johnson is payee in a bill and sells the bill to Henry Hawkins, he may indorse it by simply writing his name, "John Johnson," on the back of the bill. This is called a "blank" indorsement. Hawkins on getting the bill can negotiate it by mere delivery.

If Johnson had indorsed the bill "Pay to Henry Hawkins, or order," adding his signature, the bill is said to be "specially indorsed." Hawkins cannot in this case negotiate the bill further without himself indorsing it.

If Johnson's indorsement had been "Pay to Henry Hawkins only," the bill is said to be "restrictively indorsed," and Hawkins is thereby prohibited from negotiating the bill further.

By using such words as "*sans recours*" [or "without recourse"] Johnson would exclude his own personal liability. Such an indorsement, of course, requires the transferee's consent.

If the payee or indorsee is wrongly designated or his name misspelt, he may indorse the bill as therein described, adding, if he thinks fit, his proper signature. If the proper signature is not added, summary diligence is incompetent.

If the back of the bill is insufficient to contain all the names of indorsers, a slip of paper, called an "allonge," may be attached for further indorsements.

A holder in due course is defined by section 29 of the Act as "a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

A holder in due course holds it free from any defects in the title of a prior party to the bill; *e.g.*, his position would be unaffected although a prior party had stolen the bill. This quality of negotiability (*i.e.*, transferability free from defects) during currency is one of the great privileges of bills, which make them so valuable as a means of exchange in commerce. Current bills belong to that most important and useful class of documents called negotiable instruments. (See p. 52.)

[An overdue bill, on the other hand, is not a negotiable instrument. It can only be negotiated subject to any

defect of title affecting it at its maturity, and no person who takes it can acquire or give a better title than that which the person from whom he took it had. A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time.

✓ **PRESENTMENT FOR PAYMENT** (sections 45-47).—When a bill becomes due it is the duty of the holder to present it to the acceptor or drawee for payment. Presentation for payment must be made on the day the bill falls due, *i.e.*, the last day of grace. If it be not so presented, the holder loses all claim against the drawer and indorsers. But failure to present for payment does not discharge the acceptor from liability, unless presentation for payment is required by the terms of the acceptance.

When a bill is payable on demand, it must be presented within a reasonable time after its issue in order to render the drawer liable and within a reasonable time after its indorsement to render an indorser liable. In determining what is a reasonable time regard is had to the nature of the bill, the usage of trade with regard to similar bills and the facts of the particular case.

The bill must be presented at a reasonable hour on a business day at the proper place. The proper place is the place of payment specified in the bill; where no place is so specified, the address of the drawee or acceptor given in the bill; where that is not given, his place of business if known, and, if not, his ordinary residence, if known; in any other case it may be presented to himself personally wherever he can be found, or at his last known place of business or residence.

Where there are two or more drawees or acceptors, who are not partners, and no place of payment is specified, presentment must be made to them all. If the drawee or acceptor is dead, and no place of payment is specified, presentment must be made to a personal representative,

if such there be, and with the exercise of reasonable diligence he can be found. Where authorised by agreement or usage, a presentment through the post office is sufficient.

Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Presentment for payment is dispensed with (*a*) where, after the exercise of reasonable diligence, it cannot be effected; but the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured does not dispense with the necessity for presentment; (*b*) where the drawee is a fictitious person; (*c*) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented. *E.g.*, where the acceptor is an accommodation party (see Accommodation Bill, *infra*); (*d*) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented; (*e*) by waiver of presentment, express or implied.

A bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained, or when presentment is excused and the bill is overdue and unpaid. When a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

✓
NOTICE OF DISHONOUR (sections 48-50).—When a bill is dishonoured, either by non-acceptance or non-payment, notice of dishonour ought at once to be given by the holder to every party whom he wishes to hold liable for the

default of the drawee. The notice may be given in writing or by personal communication. The former is more usual and preferable. Notice of dishonour is usually sent by post. If the notice is duly addressed and posted, the sender is deemed to have given due notice notwithstanding any miscarriage by the Post Office. In the absence of special circumstances, the following are the rules as to time of giving notice.

(a) When the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter.

Where a party to a bill has received due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to any other parties whom he wishes to make responsible.

In certain special circumstances, detailed in the Act, delay in notice is excused or notice is dispensed with.

The following are forms of notice (a) to drawer, and (b) to indorser:—

(a) To A B [address] (place and date.)

Take notice that a bill for £ drawn by you under date and payable in months, has been dishonoured by non-payment (or non-acceptance), and that you are held responsible therefor.

E F.

(b) To C D [address] (place and date.)

Take notice that a bill for £ drawn by A B, under date payable in months, which bears your indorsement, has been dishonoured by

non-payment (or non-acceptance), and that you are held responsible therefor. E F.

✓ **LIABILITIES OF PARTIES.**—The acceptor is the principal debtor in the bill. If the bill is dishonoured the drawer and indorsers are all liable to the holder in payment, provided the latter has given them due notice of the dishonour. He may recover from any one of them, or partly from one and partly from another. If an indorser pays the amount he may in turn recover from the drawer or any prior indorser (sections 54-58).

Thus, take a bill drawn by A upon B and payable to C, which has been duly accepted by B. During its currency C has indorsed it to D, D to E, E to F, and F to G. G presents it to B for payment, and it is dishonoured. G gives notice to F. F is liable to G. F may proceed against any previous indorser, E, D, and C, or against the drawer, A, but must at once give notice of dishonour to all whom he intends to hold responsible, just as G was obliged to give notice to him. If F knew E to be undoubtedly good for the amount, he might only give notice to him, and he in his turn would give notice to C, D, and A. G might at the outset have given notice to the drawer and all the indorsers, in which case, if F pays G, he does not require to give a fresh notice to the others.

✓ **NOTING OR PROTEST OF BILL** (section 51).—Where an inland bill has been dishonoured it may, if the holder thinks fit, be noted for non-acceptance or non-payment, as the case may be. This is not necessary to preserve recourse against the drawer or indorsers, but it is necessary in order to warrant summary diligence.

Where a foreign bill has been dishonoured, it must be duly protested for non-acceptance or non-payment, as the case may be. If it be not so protested, the drawer and indorsers are discharged.

When a bill is noted or protested it must be noted on the day of its dishonour. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

The noting and protest must be made by a notary public. It is not necessary that he should be present when the bill is presented. He is warranted in making the protest upon the report of his clerk or other trustworthy person.

Where the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate in all respects operates as if it were a formal protest of the bill (section 94).

The following is the usual memorandum of noting put upon bills:—

4/11/10. Pnp. (*i.e.*, protest for non-payment) A B, N.P.

4/11/10. Pnac. (*i.e.*, protest for non-acceptance) A B, N.P.

A protest must contain a copy of the bill, must be signed by the notary making it, and must specify the person at whose request the bill is protested, the place and date of protest, the cause or reason for protesting the bill, the demand made and answer given (if any), or the fact that the drawee or acceptor could not be found.

Where the stamp duty on the bill or note does not exceed one shilling, the duty on the protest is the same as on the bill. In any other case the duty is one shilling.

✓ **SUMMARY DILIGENCE.**—Bills derive much of their popularity from the fact that no document of debt can be

more speedily enforced. Under the law of Scotland, prior to the Bills of Exchange Act, they enjoyed the privilege of summary diligence, and that Act neither alters nor affects in any way the law and practice in Scotland in regard to summary diligence. To obtain the benefit of summary diligence it is necessary that the bill, on being dishonoured either by non-acceptance or non-payment, should be duly protested by a notary public. As regards the drawers and indorsers, due notice of dishonour must also have been given. The protest must then be registered within six months in the Books of Council and Session or in the Books of the Sheriff Court within the jurisdiction of which the debtor resides. The six months during which the protest may be registered run from the date of the bill in case of non-acceptance, and from the date on which payment is due in the case of non-payment. In the case of bills payable on demand they run from the date of the demand.

It being unnecessary to present a bill for payment in order to render an acceptor liable, can summary diligence proceed against the acceptor by presenting the bill at any time within the six months after maturity? It was formerly a common practice to do diligence on protests proceeding on such presentment. But the opinions expressed in *Neill v. Dobson, Molle & Co*, 1902, 4 F. 625, seem to assume that presentment on the due date is necessary in the case of an acceptor just as in the case of any other party to a bill. It may, however, be noted that the decision of the point was not essential in disposing of *Neill's* case, in which, it is evident, the Court had not before them the practice alluded to.

For summary diligence it is thought that the protest must be made by a notary, a certificate by a householder or substantial resident not being sufficient.

To entitle the holder to use summary diligence the bill must be *ex facie* complete and regular. Accordingly, if the bill is signed by initials or by mark, or undated, or

accepted conditionally, or plainly vitiated or altered, summary diligence is incompetent.

The protest having been recorded in the appropriate register, an extract is obtained. This extract is equivalent to the extract of a decree in Court, and the holder may proceed against the various parties liable as if he had obtained decree against them after raising an action in Court. The extract protest, like an extract decree, contains a warrant for execution.

Diligence is the name applied to the procedure whereby a decree of Court is carried into execution. The diligence is here said to be summary, because the creditor has been placed in a position to use diligence without having to establish his claim by an action in Court.

Thus, in avoiding the delay and expense of an ordinary action, the privilege of summary diligence is of great value and importance.

A holder may proceed on a bill by an ordinary action instead of summary diligence, and, where the latter course is incompetent, an ordinary action is the only available mode of procedure.

✓ **REFEREE IN CASE OF NEED.**—This is a person whose name is inserted by the drawer or any indorser as a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. It is in the option of the holder to resort to the referee in case of need or not as he may think fit (section 15).

There is no statutory form of reference in case of need. The usual form, written under the drawee's address is: "In case of need apply to A B for C D," or "In case of need apply to at ."

A dishonoured bill must be protested before it is presented to the referee in case of need (section 67).

✓ **ACCEPTANCE FOR HONOUR** (sections 65-67).—If a bill has been protested for dishonour by non-acceptance and

is not overdue, any person not already liable thereon may, with the consent of the holder, accept the bill for the honour of the drawer or any indorser. It may be so accepted for part only of the sum for which it is drawn. An acceptance for honour (*a*) must be written on the bill and indicate that it is an acceptance for honour, and (*b*) must be signed by the acceptor for honour. Such acceptances are not common in practice. No special form of words is necessary. The usual form is "Accepted for the honour of A B *supra* protest," or simply "Accepted S.P.," followed by the signature. When it is not expressly stated for whose honour the acceptance is made, it is deemed to be for the honour of the drawer.

An acceptor for honour is liable to pay the bill if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts. He is liable to the holder and to all parties on the bill subsequent to the party for whose honour he has accepted. The bill must be protested for non-payment before it is presented for payment to the acceptor for honour. It must thereafter be presented to him without delay (subject to similar excuses for delay as in the case of presentment for payment), and if dishonoured by the acceptor for honour it must be protested for non-payment by him.

✓ **PAYMENT FOR HONOUR.**—Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. Payment for honour must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it. When a bill has been paid for honour, all parties subsequent to the person for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the person for

whose honour he pays and all parties liable to that person (section 68).

✓ **ACCOMMODATION BILLS** (section 28).—Suppose Brown asks Robertson to accept a bill drawn by him for which no value has been given, and Robertson does accept, the bill is called an “accommodation bill.” The bill is so called because Robertson accepts it simply to accommodate Brown. He lends his name for the accommodation of Brown. As between Brown and Robertson, Robertson is, of course, not liable. But if Brown discounts the bill, or in any way transfers it to a holder for value, Robertson is liable to the holder, whether such holder knew it to be an accommodation bill or not. An accommodation party may sign, not only as an acceptor, but as a drawer or indorser, and the same rule applies. He is liable to a subsequent holder for value. Such bills are also called wind bills or kites.

✓ **PAROLE EVIDENCE**.—By section 100 of the Act it is enacted that “in any judicial proceedings in Scotland any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence.” This section only applies to Scotland. Its terms have given rise to controversy as to how far parole evidence is permissible. As a rule, it is not allowable to contradict or modify a written obligation by parole evidence, but this section introduces an exception to this rule of law when the question involved is one of liability on a bill.

An acceptor of a bill, who is on the face of it the debtor, may under this section prove by parole that he is not the debtor, but had only granted the bill for the accommodation of the party suing on the bill (*Viani v. Gunn*, 1904, 6 F. 989).

In defence to an action upon a bill, A B was allowed to prove by parole evidence the following arrangement—

that the bill was originally granted as a means of financing him and enabling him to purchase a spirit dealer's business; that the pursuers undertook to renew the bill from time to time as it or the renewal of it fell due, provided that (1) A B, the defender, took from the pursuers all the beer he required for retail in his business, and (2) that he regularly paid interest on the amount of the debt; and that this arrangement was to hold good during the currency of the lease of his premises and whilst the business continued profitable (*Drybrough v. Roy*, 1903, 5 F. 665).

In *Harker v. Pottage*, 1909, 1 S.L.T. 155, the Lord Ordinary (Skerrington) held that the defence of a parole agreement by the payee not to demand payment of a promissory note till after the death of the maker was a relevant defence to an action for payment in his lifetime.

The decisions as to the application of this section of the Act are somewhat difficult to reconcile. Reference may be made to *Stagg & Robson v. Stirling*, 1908, S.C. 675 (where the Court held that the provision did not apply) and the cases therein cited.

✓ **ALTERATION OF BILL** (section 64).—If a bill is materially altered, all the parties who were liable up to the time of alteration are relieved of all liability, subject to the exception aftermentioned. The following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. Suppose that A sells goods to B on three months' credit, and draws a bill in his own favour upon B for £100 at three months, which B accepts. At the end of a month A indorses the bill to C for value. C, without consulting either A or B, alters the bill so as to make it payable two months after date, instead of three. He then indorses it to D for value, D to E, E to F, and

F to G. If the bill is presented to B, the acceptor, for payment, he may refuse payment because of the alteration. G, the holder, has no right against A or B, who signed the bill before the alteration. But he has a right against F, E, D, and C, who sign after the alteration.

To this rule there is an exception, viz., that if the alteration is not apparent a holder in due course may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. Thus if the alteration in the previous example from "three" to "two" months had been so skilfully made as not to be apparent, G would be entitled to recover from the acceptor at the end of the three months according to the original tenor of the bill. The following case is a good illustration:—A accepted a bill for £500 for the accommodation of a friend named B. B had written out the bill not on a 5s. but on a 40s. stamp. He afterwards filled in three thousand in front of five hundred, making it a bill for £3500 bearing to be accepted by A. B then took the bill to C, a financier, who discounted it. A was held to be liable to C only to the extent of £500, the amount of the bill before it was altered. If the alteration had been apparent, so that C could have perceived it, he could not have recovered from A to any extent (*Scholfield*, 1896, A.C. 514).

✓ **FORGED OR UNAUTHORISED SIGNATURES.**—A forged or unauthorised signature is wholly inoperative, and can give no rights to any one (section 24). It goes without saying that if Smith draws a bill upon Brown payable to Jones or order, and forges Brown's signature so as to make it appear that Brown has accepted it, it is quite impossible for Jones to recover from Brown. The forged signature of Brown is quite inoperative. Suppose, however, that the bill is duly accepted by the genuine signature of Brown, and is handed to Jones. The bill is then stolen from Jones, and the thief, after forging Jones'

indorsement on the back, disposes of it to Robertson for value. Robertson, although he has taken the bill in absolutely good faith, cannot recover from Brown, for Jones' signature being forged carried no rights to Robertson. Jones remains the true owner of the bill, and may recover from Brown. Jones ought immediately on discovering the loss of the bill to apprise Brown, the acceptor, so as to put him on his guard not to pay the bill to any other person. Otherwise complicated questions may arise in the event of Brown, without notice of the theft, having paid the bill to Robertson on presentation. No rules are expressly given in the Act for such cases, and the question of liability will be largely determined by the particular circumstances of each case.

If, on a bill becoming due payment has been made and received in good faith and, after the lapse of such an interval of time that the position of the holder may have been altered for the worse, the indorsements on the bill prove to be forgeries, the money so paid cannot be recovered from the holder (*London and River Plate Bank*, 1896, 1 Q.B. 7).

✓ **LOST BILLS.**—If a bill is lost before it is overdue, the person who was the holder may apply to the drawer to give him another bill of the same tenor, giving security to him if required against loss in the event of the bill being found again. If he refuses this request to give a duplicate bill, he may be compelled to do so (section 69).

In any proceedings upon a bill the Court may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court against the claims of any other person upon the instrument in question (section 70).

✓ **SEXENNIAL PRESCRIPTION.**—The statute 12 Geo. III. cap. 72 provides that proceedings cannot be taken on a bill or note (bank notes excepted) by way of diligence

or action after the expiry of six years. The six years run from the last day of grace, if the bill or note is payable on a fixed or ascertainable future date, and from the date of the bill or note, if payable on demand. After the lapse of six years, the bill or note prescribes—it ceases to exist as a document of debt. The creditor thereafter is confined to the writ or oath of the debtor to prove the debt and the fact that it is still due or “resting owing.”

✓ EXTINCTION OR DISCHARGE OF BILLS (sections 59, 61, 62, 63).—A bill is discharged as regards all parties in the following ways:—

(1) By payment made at or after maturity by or on behalf of the acceptor. Payment by any other party, *i.e.*, by the drawer or an indorser, does not extinguish the claim for repayment against the acceptor or prior indorsers. By section 9 of the Finance Act, 1895, payments to account, marked upon the back of a bill, of the value of £2 and upwards are liable to one penny of stamp duty.

(2) By the acceptor becoming holder at or after maturity.

(3) By the holder renouncing his rights against the acceptor at or after maturity. If the bill is not delivered up to the acceptor the renunciation must be in writing.

(4) By cancellation of the bill by the holder or any one on his behalf. This means actual obliteration of the bill itself.

BILLS OF EXCHANGE ACT, 1914.—This is a short Act making provision in connection with the present war with respect to bills of exchange payable outside the British Islands. Delay in presentment of such a bill is excused, if the delay is due directly or indirectly to circumstances arising out of the war or to the impracticability, owing to similar circumstances, of transmitting the bill to the place of payment with reasonable safety. Where in an action upon such a bill it is shown to the

Court that the bill has been lost, and that the loss can reasonably be presumed to be due to circumstances attributable directly or indirectly to the war, the Court may allow proof of the bill to be given by means of a copy certified by a notary public or other reasonable evidence, provided that such indemnity be given against the claims of other persons as the Court may require. The operation of the Act may be determined or limited by order in Council; but subject to such order, the Act will have effect during the continuance of the war and for six months thereafter.

II.—Cheques (sections 73-82).

✓
DEFINITION.—A cheque is defined as “a bill of exchange drawn on a banker payable on demand” (section 73).

FORM.—The form of a cheque is very familiar. Every bank supplies cheque books to its customers. The cheques in these books are impressed with a penny stamp in one corner, and may be detached from the book as required, the particulars of each cheque being kept on the counterfoil. The usual form is—

No. 12345.

Aberdeen, 1st August, 1910.

The North of Scotland Town and
County Bank, Limited, Aberdeen.

Pay to Mr. John Smith or order (or bearer)
Fifty pounds sterling.
£50.

William Brown.

Although these forms supplied by the bank are for convenience almost invariably made use of, yet if a person writes out an order on his banker on an ordinary piece of paper and puts a penny stamp on it, and signs

it, cancelling the stamp in doing so, this makes a perfectly good cheque.

✓ **PRESENTATION FOR PAYMENT.**—The rule is that a cheque must be presented to the bank for payment within a reasonable time. If this has not been done, and the drawer of the cheque suffers any loss thereby, he may deduct that loss from the amount due on the cheque (section 74). Take an example. A receives a cheque for £50 from B, but instead of presenting it for payment at once he keeps it for a month. In the meantime the bank suspends payment, and ultimately has to go into liquidation, with the result that it pays its creditors 5s. in the £. B had at the time, say, £150 at his credit in the bank. If A had presented the cheque at once he would have been paid the £50, and B would have been a creditor only to the extent of £100. Instead of the £50 A is now only entitled to £12 10s., being the dividend of 5s. in the £ on the amount of the cheque. A must bear the loss of the £37 10s., which was caused by his delay.

✓ **CROSSED CHEQUES (sections 76-82).**—In paying accounts by means of cheque the drawer frequently draws two parallel lines across the face of the cheque and writes the words “and Company,” or “& Co.” between the lines. The two parallel lines without the words mentioned have the same effect. This is called a “general” crossing. The effect is that the cheque cannot be paid over the counter. It can only be paid to another bank. If the holder of such a cheque got payment in cash from the drawer’s bank and it should turn out that he had no right to the cheque the bank will be liable in repayment. Suppose that Y receives a cheque for £25 payable to himself, or order, and crossed generally as above. After Y has indorsed it, it is stolen by A, who disposes of it to B. B takes it in good faith and for value (not necessarily full value) and pays it into his bank. His bank presents it to

the bank on which the cheque is drawn and receives payment. Here Y has no right of action against the bank for paying. But if B had not paid it into his own bank but presented it and received cash from the bank at which the cheque was payable, then Y might recover from the latter bank. They had no right to pay except through a bank.

If, in addition to the two parallel lines and the words "& Co.," the name of a particular bank is inserted between the lines, the cheque is said to be crossed "specially." The effect is that it can only be paid through the particular bank mentioned. If in the above illustration the cheque had been specially crossed with the name of a particular bank, B could only receive payment through that bank.

These "crossings" do not render the cheque not negotiable. They merely make it payable through a bank. The holder in due course has a perfect title to it. To take away the negotiability of a cheque there must be added the words "Not negotiable." If, in the foregoing example, the words "Not negotiable" are added to the crossing, B can only acquire the right which the thief A had to the cheque, *i.e.*, no right at all—and must hand over the proceeds of the cheque to Y, who is the person legally entitled to the money. If it turned out that B was a man of straw and unable to refund to Y the amount of the cheque, Y would have no remedy against either of the banks. In such cases bankers are protected from liability so long as they act without negligence and in good faith.

The provisions in the Act as to crossed cheques apply also to dividend warrants.

WHEN MUST BANKER HONOUR CHEQUES.—A banker must honour cheques as long as he has funds of the drawer in his hands sufficient to meet them. There is an implied contract that he will do so. If in these circumstances he

dishonours a cheque he is liable to the drawer in damages. The amount of damage is made up of the actual loss, if any, in connection with the particular transaction and compensation for loss of credit and reputation, which in the case of a merchant may be serious.

The banker is also liable for dishonouring cheques if they are within the limit of an overdraft agreed upon.

A bank would not be bound to pay on presentation of an overdue cheque, *i.e.*, a cheque which had been in circulation more than a reasonable time. The banker can demand time to communicate with his customer, and ought to do so to avoid the risk of liability. Suppose a cheque one month old is presented to a bank and paid without inquiry, the bank would be liable should it turn out the cheque had been stolen.

If A receives a cheque for £100 from B, and it turns out that B has only £75 at his credit in the bank, according to the law of Scotland the bank cannot refuse to hand over to A the £75. In England bankers claim the right to refuse to pay anything if they have not sufficient funds on hand to meet the whole amount in the cheque.

A banker must refuse to honour a cheque—

- (a) When payment is countermanded by his customer.
- (b) When he receives notice of the death of his customer; and
- (c) When he receives notice of his customer's bankruptcy.

✓ **FORGED CHEQUES AND FORGED INDORSEMENTS.**—Suppose A receives a cheque for £100 from B, payable to A, or order. A dishonest clerk in A's employment forges A's indorsement on the back and receives cash from the bank for the £100. The banker is not liable for the loss if he paid in good faith and without negligence. He is not responsible when the indorsement has been forged.

If, however, the cheque is itself a forgery, the banker

who pays it must lose. If A's clerk forges A's signature to a cheque on A's bank, presents it, and receives cash, the bank is liable in the loss.

It is forgery also to fraudulently alter a document. A cheque for £100 may be fraudulently altered to read £1100. If an alteration is apparent, the banker who pays is liable in any loss. Otherwise he is not liable, provided he pays in good faith and without negligence. If the alteration is not apparent, or has been facilitated by the negligence of the bank's customer, the loss must fall on the customer.

III.—Promissory Notes (sections 83-89).

A promissory note is "an unconditional promise, in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer" (section 83). A bill of exchange is an *order* to pay, while a promissory note is a *promise* to pay.

The following is an example of a promissory note:—

£100.

London, 1st August, 1910.

Three months after date I promise to pay to Mr. William Smith or order One hundred pounds for value received.

John Brown.

John Brown is the "maker" and William Smith the "payee." The maker of the note is the true debtor. There is no "drawee" or "acceptor." A note may be negotiated in the same manner as a bill. No indorser is liable till the note has been duly presented to the maker and payment refused.

Some expression of promise is necessary to constitute a

promissory note. An acknowledgment: "Received from A B the sum of fifty pounds on loan at the rate of 5 per cent."—dated and signed, was held not to be a promissory note (*Watson v. Duncan*, 1896 (O.H.), 4 S.L.T. 75). A document in these terms: "Borrowed from A £67, July, 1878. Paid back £5, May, 1885. Leaving a balance of £62 to pay still" is not a promissory note (*Todd v. Wood*, 1897, 24 R. 1104).

The word *promise* itself is not essential, if an equivalent expression is used. Thus, in *Vallance v. Forbes*, 1879, 6 R. 1099, a document, signed and dated, in the following terms, was held to be a promissory note:—"Received from A the sum of £100, for which we herewith agree to pay him 4 per cent. per annum. The amount to be refunded twelve months after date."

Like bills, promissory notes may be either inland or foreign. A note is inland when it is, or on the face of it purports to be, both made and payable in the British Islands, and any other note is a foreign note.

The rules relating to bills of exchange apply, with the necessary modifications, to promissory notes. In applying them the maker of a note corresponds with the acceptor of a bill, and the first indorser of a note corresponds with the drawer of an accepted bill payable to drawer's order. The rules which apply to bills and not to notes are those relating to acceptance and presentment for acceptance. Unlike a foreign bill, when a foreign note is dishonoured a protest is unnecessary.

The stamp duty is determined by amount alone, and not by time of payment; *e.g.*, a promissory note for £100 requires 1s. stamp, whether it is payable on demand or at three months, while for a bill for £100 payable on demand 1d. stamp is sufficient.

If a place for payment is named in the body of a note, it must be presented for payment in order to render the maker liable. In any other case presentment for payment

is not necessary in order to render the maker liable. Presentment for payment is, of course, necessary in order to render the indorser of a note liable.

Promissory notes, like bills, have the privilege of summary diligence. They also fall under the sexennial prescription.

CHAPTER XI.

BONDS.

PERSONAL BOND.—As a rule, a mere obligation to pay money, without giving security for the payment, is contained in a promissory note granted by the debtor to the creditor. But where it is intended that the obligation should continue in existence for a considerable time, a bond is the proper instrument to use. A formally executed bond takes forty years to prescribe from the day of payment, whereas a bill or promissory note prescribes in six years.

The following is a short form of personal bond:—

I, A, having borrowed from B the sum of pounds sterling, do hereby bind myself, my heirs, executors, and successors whomsoever, to repay the said sum to the said B, his executors or assignees, at the term of Whitsunday next, within (state the place of payment), and the interest of the said principal sum, at the rate of £5 per centum per annum, from the date hereof to the foresaid term of payment, and half-yearly, termly, and proportionally thereafter during the non-payment thereof, and that at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first payment of the said interest at the said term of Whitsunday next for the interest due preceding that date, and the next term's payment thereof at Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the non-payment of the principal sum; and I consent to the registration hereof for preservation and execution; In Witness whereof, &c.

The consent to registration for preservation and execution allows the creditor to record the bond either in the Books of Council and Session in Edinburgh or in the books of a competent Sheriff Court. On obtaining an extract from either of these registers he may give the debtor a charge to pay the sums due under the bond within six days. Thus, in virtue of the clause authorising registration for execution, the creditor may do summary diligence against the debtor, the extract being equivalent to a decree of Court.

JOINT BOND.—Where there are several obligants in a bond the intention may be either to bind them *pro rata* only, that is, each for a proportion of the debt; or the intention may be to bind them *in solidum*, that is, to make each obligant liable for the full amount of the debt. In the former case the obligation usually runs that they bind and oblige themselves each *pro rata* and for equal proportions of the sum payable; and in the latter case the obligation usually is that they bind themselves jointly and severally (or “conjunctly and severally” or “conjointly and severally”).

While co-obligants bound *in solidum* are each liable to the creditor for the whole debt, they are *inter se* liable each for his own share only. Thus, if one pays more than his share to the creditor he has a right of relief against the others for recovery of the excess. So if one becomes insolvent, the others have to bear the consequent loss *pro rata*.

BOND OF ANNUITY.—This is an obligation to pay to the grantee during his lifetime or for a certain number of years a fixed annual sum. Annuities may be declared redeemable in certain circumstances. They are now usually purchased from insurance companies or from Government.

BOND AND ASSIGNATION IN SECURITY.—This is the name given to a document containing not only a personal bond, but also an assignation of moveable estate in security. Thus, where a person borrows a sum of money, and agrees to assign a policy of life assurance in security, he grants to the lender a bond for the sum lent and an assignation of his life policy in security. Intimation is made to the insurance company. Similarly an assignation in security might be granted of the borrower's interest in a trust estate, intimation being made to the trustee or holder of the fund.

BOND AND DISPOSITION IN SECURITY.—This is the name given to a deed containing a personal bond combined with a conveyance of heritable subjects in security. A mortgage over land or real estate is constituted by a bond and disposition in security.

CHAPTER XII.

CAUTIONARY OBLIGATIONS OR GUARANTEES.

GENERAL.—A cautionary obligation or guarantee is a contract by which one becomes bound as surety for another that he shall pay a certain debt or perform a certain act. It is accessory to a primary obligation, the debtor or obligant in which is called the principal debtor. The cautioner or guarantor undertakes to fulfil the primary obligation failing the principal debtor doing so. The contract may have reference to a single transaction or to a series of transactions (*e.g.*, a current account), the latter being usually called a continuing guarantee.

The Mercantile Law Amendment (Scotland) Act, 1856, section 6, requires that all such contracts must be in writing, and subscribed by the grantor or his duly authorised agent, "otherwise the same shall have no effect." A verbal guarantee is consequently valueless. In mercantile matters the writing does not require to be tested or holograph, the guarantee being frequently contained in correspondence between the parties. In cases other than ordinary commercial transactions it is a question not free from doubt whether the usual formalities of a deed are required, but in any event an informal writing may be validated, if followed by actings of the kind contemplated, such as advances of money (*i.e.*, *rei interventus*).

The contract of guarantee must be concluded with the creditor himself. An offer of guarantee must be accepted by the creditor either expressly or by implication.

There can be no guarantee unless there is a principal debt or primary obligation either already contracted or

in contemplation. It is important and sometimes difficult to distinguish between a guarantee and an independent obligation. If C says to B, "Send these goods to A and I shall pay the account," C is primarily liable for payment. Such a contract is not a guarantee, and does not require to be in writing. If, on the other hand, C says to B, "Send these goods to A, and if he does not pay you I will," this is a guarantee, and B cannot sue upon it unless there is writing. In such cases the nature of the obligation may be determined by inquiring to whom credit was given.

REPRESENTATION.—A creditor is not bound to make a full disclosure of facts to a cautioner on his entering into a guarantee. It is the duty of the cautioner to satisfy himself. But if the creditor does make a representation it must be fair and accurate, and if he, by concealment or otherwise, misrepresents the facts so as to mislead the cautioner as to the risk, the latter is free.

A higher duty of disclosure is laid upon the creditor in guarantees for the good conduct of servants or agents than in guarantees of a money debt. The employer must give full information to the cautioner as to the character of the person whose conduct is guaranteed, especially if he is aware of any previous conduct of a discreditable nature (*French v. Cameron*, 1893, 20 R. 966).

STAMP.—A guarantee is subject to an agreement stamp duty of 6d. "unless the matter thereof is of a value less than £5." The duty may be denoted by an adhesive stamp. A guarantee for the payment of goods sold or to be sold is exempt from stamp duty.

BENEFIT OF DISCUSSION.—Formerly a cautioner, bound simply as such, had what was known as the benefit of discussion, or *beneficium ordinis*. By this right he was entitled to insist that the creditor should "discuss" the

principal debtor before attempting to enforce payment of the debt from him. By "discussing" the principal debtor was meant, not only taking action against him, but obtaining decree and putting it into execution. This result, however, was obviated by the creditor taking the cautioner bound "as principal and full debtor," or conjunctly and severally with the principal debtor, in which case he could proceed at once against either or both the obligants. The Mercantile Law Amendment Act, 1856, section 8, does away with the right of discussion, so that the creditor may now on default of the principal proceed at once against the cautioner. He does not require to sue the principal debtor first, unless that is expressly stipulated in the contract.

CO-CAUTIONERS.—Where there are several persons bound simply as cautioners, each is liable only for his own proportionate share, so long as all the co-cautioners are solvent. In case of insolvency of a co-cautioner, the deficit is made up by the others. This is called the benefit of division. But cautioners, bound as co-obligants with the principal debtor or as full debtors or conjointly and severally, have not the benefit of division, and the creditor may proceed against any one of them for the full sum due. Cautionary obligations are almost invariably drawn out in such terms as preclude the right of division.

Although in a question with the creditor each cautioner is as a rule bound for the whole sum due, co-cautioners have relief *inter se*. In relation to one another, each is liable only for a proportionate share. If, therefore, one cautioner pays the whole debt or more than a proportionate share, he has a right of relief against his co-cautioners for their rateable contributions.

A cautioner must communicate to his co-cautioners the benefit of any security, ease, or relief which he may have obtained. He is not entitled to apply to his own benefit solely any security received by him from the principal

debtor or any abatement allowed to him. He must make them available to reduce the liability of all the cautioners.

RIGHTS OF CAUTIONER.—If the cautioner has had to pay the debt or any part of it, he may make good his relief or right of indemnification against the principal debtor. He may take proceedings against the principal debtor for recovery of what he has paid and for all loss sustained by him in consequence of the debtor's default. Further, a cautioner on full payment of the debt is entitled to all rights held by the creditor against the principal debtor. He is entitled to have assigned to him all securities for the debt held by the creditor.

Thus, a cautioner for rent may, on payment, demand an assignation of the landlord's right of hypothec in his favour. A cautioner has a right to be put in the creditor's place to enable him to work out his right of relief.

LIABILITY OF CAUTIONER.—The extent of the cautioner's liability is determined by the terms of the contract. The cautioner cannot be liable for a greater sum than the principal, for the accessory obligation cannot be more extensive than the primary.

Where the guarantee is general and unqualified in its terms, the cautioner's liability is co-extensive with that of the principal debtor. A guarantee is as a rule presumed to refer only to future transactions, unless the words of the contract clearly indicate intention to include past.

BANKRUPTCY OF PRINCIPAL DEBTOR.—If the principal debtor becomes bankrupt, the creditor may rank on his estate for the whole debt and claim from the cautioner the balance of the debt after receiving the dividend. The cautioner cannot rank on the debtor's estate for the balance so paid, because in bankruptcy there is a rule against the double ranking of the same debt. On the

other hand, the creditor may call upon the cautioner to pay the debt guaranteed by him, and if the cautioner pays, he may rank upon the debtor's estate. Thus, if the guaranteed debt amounts to £100 and the debtor's estate pays a dividend of 5s. per £, the creditor may claim a dividend of £25 from the estate and recover the balance of £75 from the cautioner; or if the cautioner pays the £100 to the creditor he (the cautioner) may claim the dividend of £25. But they cannot both rank on the estate for the same debt.

GUARANTEE AGAINST ULTIMATE LOSS.—If a cautioner undertakes a guarantee limited in amount and the principal debtor incurs a debt of greater amount, what is the position on the bankruptcy of the principal debtor? For example, assume that the guarantee is limited to £400 and the debt amounts to £600, and that the debtor's estate shows a dividend of 5s. in the £. The dividend payable on a claim of £600 would be £150. Is the creditor entitled to obtain the £150 from the bankrupt's estate and in addition to receive the £400 from the cautioner? Or, may the cautioner on paying the £400 to the creditor rank on the debtor's estate for £400 and thus receive £100, leaving the creditor to rank for £200, on which he would receive a dividend of £50? In the former case, the creditor would receive £550 in all, and the cautioner would pay £400. In the latter, the creditor would receive £450, and the cautioner would be £300 out of pocket. In such cases, where the debt exceeds the amount of the guarantee, the question is whether the cautioner is liable to pay the ultimate loss with merely a limit on the extent of his liability or whether he undertook only to pay a portion of the debt, limited to the amount stated in the guarantee. The answer to that question depends on the terms of the guarantee.

The latter result is exemplified in the case of *Veitch v. National Bank of Scotland*, 1907, S.C. 554. B signed

a cash-credit bond in favour of a bank for the sum of £1500 to be advanced by the bank to A, and undertook to refund whatever loss not exceeding £1500 of principal the bank might sustain through their transactions with A, it being stipulated that the bond "shall to the extent foresaid be a covering security to said bank against any ultimate loss that may arise on the transactions of A with said bank." A ultimately granted a trust deed for creditors, and was then due £5855 to the bank. The bank received a dividend of 13s. 4d. in the £ from A's estate, leaving £1951 as the balance still due. The bank claimed £1500 from B, but it was held that B's guarantee was limited to repayment of an advance of £1500 to be made to A by the bank, and that as the bank had already recovered (by the payment of 13s. 4d. in the £) £1000 of this advance, B was only liable for repayment of the remaining £500. If B had paid the £1500 to the bank, he would have been entitled in relief to an assignation of the bank's right to rank on A's estate for that sum.

On the other hand, the following cases are illustrations of guarantees where the cautioner has been held liable to pay the ultimate loss with merely a limit on the extent of his liability. In *Harvie's Trustees v. Bank of Scotland*, 1885, 12 R. 1141, a bank, in security of cash advances to a customer, A, received a letter of guarantee for due payment of all sums for which A might be liable to the bank, the amount of the guarantee not to exceed £15,000, the cautioner declaring "that I shall not be entitled to demand from you an assignation of this guarantee so long as the said A is indebted to you in any sums such as aforesaid," and the guarantee being granted "without prejudice to any other securities or remedies which you have or may acquire for the general obligations or any particular obligation of the said A." A having been sequestrated, the cautioner paid up the £15,000 and claimed a ranking. The Court held that the bank were entitled to rank for the full amount of their debt, and

that the cautioner was not entitled to rank in competition with the bank. Lord President Inglis said—"There is clearly some blunder in the language used here; it is not the guarantee which is not to be assigned, but what is meant is, that the cautioner is not to have an assignation so as to give him relief against the principal debtor as long as the principal debtor owes anything to the creditor. There is here, therefore, I think a distinct declaration which precludes the cautioner from saying that he can interfere with the bank recovering by all means in their power the sums owing to them by A. Any difficulty on this point is removed I think by what follows."

Again, where a continuing guarantee to the extent of £300 was granted to a bank for sums of money due or to become due to the bank from their customer, S, and it was stipulated therein that any dividends which the bank might receive on the bankruptcy of S were not to prejudice their right to recover from the cautioner to the full extent of the guarantee any sums, which after receipt of such dividends might remain owing to them by S, it was held that on S becoming bankrupt the bank were entitled to receive the £300 from the cautioner and, in addition, to rank on the debtor's estate for their whole debt without any deduction (*Ex parte National Provincial Bank, In re Sass*, 1896, 2 Q.B. 12). See also *Ellis v. Emmanuel*, 1876, L.R. 1 Ex.D. 157.

DISCHARGE OF CAUTIONER.—The liability of a cautioner may be extinguished in a variety of ways—

(1) The express discharge of the cautioner by the creditor.

(2) Expiry of the period for which the cautioner is bound without default on the part of the principal debtor. The guarantee is frequently limited in point of time.

(3) Payment or discharge of the principal debt. There cannot be a guarantee in regard to an obligation which is no longer in existence. But a creditor may accept a

composition from the debtor's estates sequestrated under the bankruptcy statutes, and concur in the debtor's discharge without freeing the cautioner.

(4) Conduct on the part of the creditor prejudicial to the cautioner's rights, such as (*a*) giving the principal debtor time to pay. This does not mean mere delay in enforcing a debt, but an agreement preventing the creditor from enforcing payment in terms of the original contract of debt; (*b*) discharge or release of a co-cautioner. By section 9 of the Mercantile Law Amendment Act this operates as a discharge of the other cautioners; (*c*) the loss or the giving up without the consent of the cautioner of a security held by the creditor. The cautioner is thereby relieved to the extent of the value of the security.

(5) By the Partnership Act, 1890, section 18, a continuing guarantee given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm.

(6) Septennial prescription, which applies only to certain cautionary obligations. The statute 1695, cap. 5, limits the liability of a cautioner to seven years. But to obtain the benefit of the Act one of two conditions is requisite. The cautioner must either be bound expressly as a cautioner in the same writing as the principal debtor, or if bound nominally as principal or co-principal, the fact of his being a cautioner must be shown by a clause of relief against the true principal appearing in the bond itself, or by a separate bond of relief duly intimated to the creditor at the time of his receiving the principal bond. The Act applies only to obligations for sums of money. It does not apply to obligations in which the term of payment is fixed beyond the seven years, nor to collateral obligations, such as mercantile guarantees. Where the Act applies, the cautioner's liability is totally extinguished by the expiry of the seven years. It does not merely limit the mode of proof or the means of

enforcing the obligation, as in the case of some of the other shorter prescriptions. The benefit of the Act is excluded by action or diligence used by the creditor against the cautioner within the seven years.

(7) Revocation by cautioner. A cautioner in a continuing guarantee for an indefinite period may at any time give notice that he will not be liable for further dealings or advances.

(8) The death of the principal debtor or creditor terminates liability of cautioner for future transactions, unless contract clearly extends to transactions with deceased's representatives.

(9) On death of cautioner his representatives remain liable. Where cautioner might have terminated his liability by notice, it is thought that intimation of his death would free his representatives from liability for subsequent transactions.

CHAPTER XIII.

AGENCY.

NATURE.—Agency may be defined as a contract by which one person, called the principal, empowers another person, called the agent, to act for him, and agrees to be bound by the agent's acts as if they were his own. The agent brings his principal into legal relationship with third parties.

A principal must have capacity to contract, and can act through an agent only to the extent of that capacity. Thus, a minor or married woman has only a limited capacity to contract. Each of them can act as principals only to that extent. But the acts of an agent are not limited in this way. Persons who are under legal disability in acting for themselves may act to the fullest extent as agents in binding the principal and third parties. Such an agent, however, may not incur the same personal liabilities or acquire the same personal rights as a person of full legal capacity.

Agency corresponds to the gratuitous contract of mandate in Roman law, but the modern agent almost invariably acts for remuneration. He is usually paid either by salary or commission.

CONSTITUTION.—The contract of agency may be constituted in writing or orally or tacitly by some act directly recognising a person as an agent. The writing may consist of a formal deed or a less formal writing. Of formal deeds the most common is known as a power of attorney or factory and commission. It is the proper deed to be granted by a person abroad to one in this

country for the management of his affairs here, or by a person in this country to some one abroad, in India, for instance, to sell his property there. But as a rule the writing constituting agency in mercantile affairs is of a very informal character, and very extensive powers are frequently conferred by a letter in the simplest terms. Thus, what is called a procuratory or procuration may be given to a manager in these terms—"I constitute you my procurator or mandatory to draw, accept, or indorse bills for me in the course of my business." In the course of correspondence merchants and manufacturers are constantly employing and instructing agents for the sale and purchase of goods, the powers conferred varying with the circumstances and the intentions of the parties. Similarly, in commercial matters an agent is frequently employed and instructed verbally. Agency may be deduced from circumstances, such as putting a manager into a shop to take charge of it.

RIGHTS OF AGENT AGAINST PRINCIPAL.—An agent has the following rights against his principal:—

1. He is entitled to recover the agreed-on commission or remuneration and, as a rule, all expenses properly incurred in the conduct of agency.

2. He is entitled to be indemnified against all obligations properly undertaken on behalf of the principal.

3. An agent may have a lien or right of retention over goods or property of his principal coming into his possession in the course of his agency, so as to secure payment of his remuneration and disbursements, and indemnity from obligations undertaken on behalf of the principal. This right of retention may be established by special agreement or the usage of a particular profession or trade. The extent of the right competent to certain classes of agents is well settled. Thus, a law agent may retain his clients' title deeds and papers in security of his business account, but not for payment of cash

advances or salary or commission. A mercantile agent or factor has a right of retention over all the goods and property in his possession belonging to the principal for the general balance due to him in an accounting with the principal. The mercantile broker has the right to retain such property only for advances or claims connected with the particular property. Lien is only a right of retention, and does not give the agent a right to sell.

DUTIES AND LIABILITIES OF AGENT TO PRINCIPAL.—

1. An agent must carry out his instructions. He must do what he has expressly undertaken to do in his contract with the principal; or his duties may be regulated by usage or the recognised mode of dealing in a particular business.

2. An agent must exercise reasonable skill and diligence. What is reasonable skill and diligence is a question of circumstances. For example, a law agent taking a bad title of property for a client is liable in damages, because he holds himself out as possessing legal knowledge and undertakes to give his client the benefit of that knowledge. A bank teller, who paid away ten £100 notes in mistake for five £20 notes in change for £100 note was held liable to the bank for the £900 so lost by his negligence (*Clydesdale Bank v. Beatson*, 1882, 10 R. 88).

3. An agent should keep proper accounts, and settle with his principal at proper times.

4. If an agent, in going beyond his powers, makes the principal liable to third parties, he is bound to relieve his principal of all loss and damage so caused.

5. An agent, being in a position of trust, must not seek his own profit beyond the commission or salary that has been stipulated. He must not put his own interest in conflict with his duty to his principal. Thus, the principal is entitled to discounts allowed on payment of accounts. If an agent, in buying for his principal,

secretly takes a commission from the seller, he may be compelled to give it up. Thus, where the managing director, on behalf of a company, contracted for the construction of fishing smacks, and, unknown to the company, took a commission from the shipbuilders on the contract, the Court ordered him to pay over the secret commission to the company with interest at 5 per cent. from the time when the sum was received (*Boston Fishing Company v. Ansell*, 1888, 39 Ch.D. 339).

It may be observed here that an important Act has recently been passed, the Prevention of Corruption Act, 1906, which makes the offering or taking of secret commissions a criminal offence. Any convicted person is liable to fine or imprisonment, or to both together. Thus, if a buyer for a firm receives a bribe from a manufacturer to buy his goods, both the buyer and the manufacturer are liable to conviction under the Act. Not only is the receiving of secret commission criminal, but also the offering of it and any attempt to obtain it. The falsification of receipts or invoices in order to deceive a principal is also criminal, both on the part of the person giving them and of the agent using them.

6. An agent may not sell to himself without express authority. The principal may demand back goods so sold, or, if the agent re-sells at a profit, the principal may claim the profit.

7. An agent may not buy from himself without express authority. The principal may reject the goods so bought, or may claim the profit made by the agent in selling to him.

RELATIONS BETWEEN AGENT AND THIRD PARTY.—An agent acting within his authority for a disclosed principal is not personally liable under the contract made by him on behalf of his principal. The principal alone is bound. But if an agent exceeds his authority and thus fails to make the contract binding on his principal, he is liable

to the third party in damages to the extent of the loss thereby incurred by such third party.

An agent becomes personally liable to the other contracting party where he acts as principal or as agent for an undisclosed principal. If the principal is subsequently disclosed, the third party may elect which of them he will hold liable. When he makes the election, the other party is exempt.

An agent is liable to a third party for his own fraud, misrepresentation or negligence, whether the principal did or did not authorise the wrongful act.

RELATIONS BETWEEN PRINCIPAL AND THIRD PARTY.—

Where a contract has been made on behalf of a disclosed principal, he alone is entitled to enforce it. He is also bound by all acts done by his agent professedly on his behalf and within the scope of the agent's authority. If the other contracting party has received notice that the agent is exceeding his authority, the principal will not be bound.

A principal may be bound by the acts of his agent although the agent goes beyond or disobeys his actual instructions. In a question with third parties he is bound by what the agent does within the ostensible or apparent scope of his authority. In mercantile affairs the extent of an agent's authority in a question with third parties may be determined by the usage of trade or prior dealings or the surrounding circumstances. Thus, where a firm had paid cash for goods bought to the seller's traveller in a series of transactions without objection on the part of the sellers and the traveller, who had no authority to receive payment in any form except by crossed cheques in favour of the sellers, fraudulently appropriated the money, it was held that the payments made to the traveller were valid as against the sellers, in respect that the purchasers had no reason to believe that he was not entitled to receive payments in that form (*International*

Sponge Importers, Limited v. Watt, 1911, S.C. (H.L.) 57).

A principal is liable for the negligence or wrongful act of the agent in the course of his employment. There can be no doubt that the principal is so liable where he authorises the wrongful act or benefits by it, but recent decisions seem to extend the rule to cases where these considerations do not apply.

KINDS OF AGENTS.—The following are some of the most important classes of agents in commercial matters:—

Mercantile Agents.—By the Factors Act, 1889, the provisions of which are extended to Scotland by the Factors (Scotland) Act, 1890, a mercantile agent is defined as one “who, in the customary course of his business as agent, has authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.” In employing a mercantile agent to sell goods, the principal sends to him either the goods or the documents of title to the goods, *i.e.*, the bill of lading, delivery order, or the like. The Factors Act gives extensive powers to a mercantile agent and security to the person dealing with him. It provides that, when a mercantile agent is in possession of goods or documents of title to goods with the consent of the owner, and he sells or pledges or otherwise disposes of them, the transaction will be as valid as if it had been expressly authorised by the owner. This provision enables a purchaser to buy with safety from a mercantile agent, without any apprehension that the purchase can be set aside by the agent’s disobeying the private instructions of his principal. Thus A sends goods to B, his agent at Leith, to sell. Afterwards he telegraphs to him not to sell. Notwithstanding the telegram, B sells the goods to C. The sale to C is perfectly good unless C knew that the authority had been recalled. The revocation of authority by the principal does not prejudice the rights of a purchaser or

pledgee if they had no notice of the revocation at the time of sale or pledge.

A pledge of the documents of title to the goods is deemed to be a pledge of the goods.

Where the pledge is for a debt already owing, the pledgee acquires no further right than the pledgor had at the time of the pledge. *E.g.*, suppose an agent has in his possession £100 worth of goods sent to him by his principal for sale, and deposits them in pledge with a creditor of his own to secure payment of an old debt of £40, the creditor must give up the goods to the principal, because the pledge, being for a debt of the agent already owing, is not valid. The pledgee would, however, be entitled to any commission or expenses due to the agent by the principal before he could be compelled to part with the goods, as he acquires the same rights against the goods as the agent had, but no more.

If a mercantile agent sells the goods in his possession to his own creditor, the creditor, in paying the price, is entitled to deduct the amount of the debt due to him, unless he knew that the goods belonged to the principal.

Brokers.—A broker differs widely from a mercantile agent. He never obtains possession of the goods or documents of title, so that the powers contained in the Factors Acts do not apply to him. He has thus no authority, as a general rule, to issue in his own name the contracts made by him, and is an agent pure and simple, his proper function being to act as a medium between the contracting parties. He is paid by commission, or brokerage, as it is usually called. There are very many kinds of brokers, *e.g.*, stockbrokers, shipbrokers, bill brokers, insurance brokers, and brokers dealing in various commodities, such as cotton, corn, wool, &c. A broker usually, on completion of a transaction, makes an entry of the particular contract in his book and signs it. He then issues two notes, called the “bought note” and “sold note.” He signs these, and sends one to the pur-

chaser and the other to the seller. The bought and sold notes begin in some such way as the following:—"Bought for A of B." "Sold to A for B," and are signed "X, broker." The broker here incurs no liability, and acquires no rights personally in the contract he makes. If the note runs, "Sold to my principal for A," the name of the principal not being disclosed, the broker is not personally liable, unless the usage of trade renders him so.

A stockbroker is employed to buy and sell stock and shares on the Stock Exchange. The principal employing him is held to agree to be bound by the rules and customs of the Exchange. With this qualification, the ordinary rules of agency apply as between a stockbroker and his principal. All transactions in the Exchange are between members, and the members are personally liable to carry out the contracts made. A stockbroker doing business in the Stock Exchange is thus, in the matter of personal liability, in a very different position from the ordinary broker.

A shipbroker is employed in the buying, selling, and freighting of ships, in adjusting charter parties, bills of lading, and selling berths to passengers, and is paid commission by the shipbuilder or shipowner, as the case may be.

An insurance broker is an agent through whom policies of insurance are effected. In marine insurance the insured, as a rule, being unknown to the underwriter, the latter looks to the broker for payment. The insured pays the premium to the broker, and the broker to the underwriter. The broker is not an agent merely. As regards receiving and paying the premium he is a principal, in the position of middleman between the insured and the underwriter.

Agents for Foreigners.—The rule in the case of agents for foreign principals is that the agent himself, not the principal, is personally liable. This is contrary to the ordinary rule of agency, and is founded on expediency, as

foreign trade would otherwise be unduly hampered. Of course, it is quite open to contract out of this liability. An agent of a foreigner is personally liable on any contract which he enters into, unless he makes it perfectly clear that he does not bind himself.

Del credere Agents.—A *del credere* agent differs from an ordinary agent in that he guarantees his principal against loss. If a customer fails to pay at the proper time, he himself is responsible to the principal. Such an agent is usually paid a higher rate of commission.

CHAPTER XIV.

PARTNERSHIP.

PARTNERSHIP ACT, 1890.—The law of partnership is to a great extent regulated and codified by the Partnership Act of 1890, 53 & 54 Vict. cap. 39. That Act, however, provides that the rules of equity and common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of the Act (section 46).

DEFINITION.—The Act defines partnership as “the relation which subsists between persons carrying on a business in common with a view of profit” (section 1); and the term “business” includes every trade, occupation, or profession (section 45).

The law of partnership does not apply to companies registered under the Companies Acts or incorporated by Act of Parliament, letters patent, or royal charter (section 1).

WHO ARE PARTNERS? (sections 2 and 3).—Joint tenants or joint owners of property, or sharers in the gross returns of property, are not necessarily partners. Sharing in the net returns or profits of a business, as a general rule, is evidence of a partnership. But there are the following exceptions:—(1) A person may receive payment of a debt by instalments out of profits without becoming liable as a partner. Thus, if a firm owes A £500, and A agrees to take one-third of the profits for two years in settlement, he does not thereby become a partner. (2) A servant or agent may be paid by a share of the profits of the business

without necessarily becoming a partner. (3) The widow or child of a deceased partner may draw an annuity out of the profits and not be a partner. It is a frequent stipulation in a partnership between A and B that, if A dies, B is to pay a specified share of the profits to A's widow as long as she lives. (4) A person who lends money to another, stipulating for interest varying with the profits, does not thereby become a partner. But the contract must be in writing and signed by all the parties. If A lends to B £500, stipulating for one-fifth of the profits as interest, he must be careful to have the contract in writing, and signed by himself and B, to avoid liability as a partner. (5) A person may sell the goodwill of his business, receiving in payment a share of profits by way of annuity or otherwise, without becoming a partner. Thus A may sell his business to B, receiving £2000 in cash for stock and fittings, and for the goodwill one-half of the profits for the next two years. By such a sale he does not become liable as a partner.

As regards the last two cases, however, it is important to observe that the rights of the person so lending money or selling the goodwill in consideration of a share of the profits are postponed to the other creditors if the borrower or purchaser becomes bankrupt. The other creditors will be first paid 20s. in the £, and the lender or seller will only be entitled to come in after that.

HOLDING OUT.—A person, although not a partner of a firm, may act in such a way as to make himself liable as a partner. He may represent himself as a partner or allow himself to be so represented. This is called "holding out." Section 14 of the Act provides—"Every one who, by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether

the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made." A person so holding out is sometimes called a "nominal partner."

Thus A states to B that he is a partner of the firm of C D & Co., and B repeats the statement to E. E, on the faith of this information; gives credit to C D & Co. A is liable to E for the debt. In representing himself as a partner A took the risk of the statement being circulated and acted upon.

It ought to be noted that this liability is only to the creditor, *i.e.*, the actual person who has given credit to the firm on the faith of the representation. Accordingly, a trustee for the firm, on its becoming bankrupt, cannot sue the person so "holding out." The person "holding out" has a right of relief against the firm.

FIRM AND FIRM-NAME (section 4).—Persons who have entered into partnership with one another are called collectively a firm, and the name under which their business is carried on is called the firm-name.

In Scotland a firm is a legal person distinct from the partners of whom it is composed. This is a very valuable and useful principle. The firm may sue an individual partner or an individual partner may sue the firm, as they are distinct persons in law.

If a firm has a social name—such as Brown & Smith or John Brown & Co.—it may sue in that name or may be sued in that name. It is immaterial what the names of the individual partners may be. The action is brought at the instance of or against the firm. If decree is obtained against the firm, it may be enforced against any of the individual partners.

If the name of the firm is descriptive, such as the Granite City Drapery Company, it is necessary in suing or being sued to add the names of three individual

partners, if there are so many, but by the recent Sheriff Courts Acts of 1907 and 1913 such a firm may now sue and be sued in the Sheriff Court under its descriptive name alone.

It is quite competent for a firm to carry on business in the name of an individual. *E.g.*, John Brown may be the name of a firm, the partners of which may be Peter Jones and James Smith.

NUMBER OF PARTNERS LIMITED.—Since the Companies Act, 1862, the maximum number of partners in a banking business is ten and in any other business twenty. No partnership can be formed consisting of a greater number of persons unless it is registered as a company under the Companies Acts—now the Companies (Consolidation) Act, 1908—or is formed in pursuance of some other Act of Parliament or of letters patent.

JOINT ADVENTURE.—A joint adventure is the name given to a simple form of partnership where two or more persons join together to make profit by a particular dealing or transaction, such as a whaling expedition, and not to carry on a course of business. As a rule, there is no firm-name. The rights and liabilities of the parties are limited to the particular undertaking.

CONSTITUTION OF PARTNERSHIP.—It is not necessary to have writing to constitute a partnership. It may be formed orally or by the conduct of the parties. For example, a man may share in the profits and management of a business, and demonstrate in such a way that he is a partner. Informal writings may also prove a partnership and set forth the rights of the members of the firm between themselves. The proper course and general practice is to have a formal deed drawn up and signed by the parties setting forth all the provisions of the partnership contract. The document is called a contract of copartnership.

CONTRACT OF COPARTNERSHIP.—This deed ought to be framed with great care, as it determines the mutual rights and duties of the partners. The contents of the contract vary considerably, according to the circumstances. It usually regulates all such matters as the period of endurance of the firm; amount of capital provided by each partner; shares of profit and loss; giving of time to the business; sums to be drawn out by the partners; right of purchase of share of deceased, bankrupt, or insolvent partner; the dissolution and winding up of the firm; settlement of disputes by arbitration. The provisions of the contract may be varied at any time by the consent of all the partners.

RELATIONS OF PARTNERS TO ONE ANOTHER (sections 24, 25, 28-30).—As pointed out, these relations are usually defined and agreed upon by a formal contract of copartnership, or they may be settled by an informal agreement, written or oral or implied from circumstances. In default of any such agreement to the contrary, the rights and duties of partners are regulated by the following rules:—

1. *Profits and Losses, &c.*—All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards all losses unless they have otherwise agreed.

2. *Indemnity, Interest, &c.*—The firm must indemnify each partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the firm's business, or for the preservation of the property of the firm.

A partner making an advance to the firm beyond the amount of capital which he has agreed to subscribe is entitled to interest at the rate of 5 per cent. per annum from the date of the advance.

A partner is not entitled before the ascertainment of profits to interest on the capital subscribed by him.

3. *Management, &c.*—Every partner may take part in the management of the partnership business. He is also entitled to have access to the partnership books, and inspect and copy them. These books fall to be kept at the place where the business is carried on. No partner is entitled to remuneration for acting in the partnership business.

4. *Decision of Majority.*—Differences arising as to ordinary matters of partnership business may be decided by a majority of the partners. But a majority of partners has no power to make a change in the nature of the business. The consent of all existing partners is necessary for such a purpose. No majority of the partners can expel any partner, unless a power to do so has been conferred by express agreement between the partners. No person may be introduced as a partner without the consent of all existing partners.

5. *Duty to Account, Disclose Profits, &c.*—Partners are bound to render to each other true accounts and full information of all things affecting the partnership. Every partner must act in good faith towards the firm and his copartners. He cannot take any personal benefit out of the business beyond the share to which he is entitled as a partner. He must account to the firm for all commissions and discounts received by him.

He cannot compete with the firm in their own line of business. If he carries on a similar business without the consent of his copartners, he must account for and pay to the firm all profits made by him in that business. Thus, if A and B are equal partners in a firm, and B, without A's consent, carried on a similar business, in which he makes £500 profit, he must communicate the benefit of that to the firm, so that A gets £250.

POWER OF PARTNERS TO BIND FIRM (sections 5-12).—Every partner is an agent of the firm for the purpose of the partnership business. In all acts for carrying on the

business in the usual way a partner binds his firm just as an agent does his principal. The same rules apply as we have already dealt with in discussing the subject of agency. The powers of a partner may be limited and restricted in the contract of copartnership. A person dealing with a partner, however, has no right to examine the contract of copartnership, and cannot be held bound by its stipulations. He may, accordingly, assume that a partner has full power to do everything usual and necessary within the scope of the partnership business. The scope of a partner's authority will vary considerably according to the nature of the business. In almost all mercantile businesses, for example, a partner would bind his firm in granting bills, buying and selling goods, and uplifting and discharging the debts of the firm. Of course, if a person dealing with a partner is aware that the partner is exceeding his authority the firm will not be bound.

An act done by a partner outside the scope or the ordinary course of the partnership business does not bind the firm. For example, a submission entered into by a partner for his firm was held not to bind the firm; and, according to a recent English case, a partner could not bind his firm to accept paid-up shares in a company in satisfaction of a debt due to the firm.

A partner cannot pledge the credit of his firm for a private purpose of his own.

A firm is liable for the wrongful acts done by a partner in the ordinary course of the firm's business, just as a principal is liable for the wrongful acts of his agent.

If money or property belonging to a third party has been received by a firm or a partner in the ordinary course of the firm's business, *e.g.*, for safe custody or investment, and has been misapplied by a partner, the firm is liable to make good the loss.

An admission or representation made by a partner in

the ordinary course of the firm's business is evidence against the firm (section 15).

These rules do not affect any general rule of law relating to the execution of deeds or negotiable instruments. By the Bills of Exchange Act the signature of the name of a firm to a bill or promissory note is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

DURATION OF PARTNER'S LIABILITY (sections 17 and 36).

—A person who becomes a partner of an existing firm is not liable to the creditors of the firm for anything done before he became a partner.

A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement. He remains liable for all debts incurred while he was a partner, unless he be discharged from such liabilities by an agreement to that effect between himself, the members of the newly constituted firm, and the creditors; this agreement may either be express or inferred from the subsequent course of dealing between the creditors and the new firm. It is not sufficient that the new firm agrees to take over the debts of the old firm. The creditor must also agree to accept the new firm as debtor.

A partner is not liable for debts incurred after he has ceased to be a partner, provided he gives due notice of his retirement. But to escape liability notice of retirement is necessary if he was known to be a partner. Notice in the official *Gazette* is sufficient as regards those persons who had no previous dealings with the firm. To those who have had previous dealings with the firm he ought to send a special circular, as he must let every creditor know that he has retired from the firm. A dormant partner, who is not known to be a member of the firm, need not give notice of his retirement from the firm.

NATURE AND EXTENT OF PARTNER'S LIABILITY.—Partners are in the position of cautioners. They guarantee the debts of the firm.

The liability of each partner to persons dealing with the firm is unlimited. A partner is liable for the debts of his firm to his uttermost farthing. In ordinary partnerships, whatever arrangement there may be among the partners themselves, each partner is liable to third parties for the whole debts of the firm.

The principle of limited liability, which is allowed by force of statute in joint stock companies, has hitherto been unknown in partnership, but has been introduced by the Limited Partnerships Act, 1907, which came into operation on 1st January, 1908.

LIMITED PARTNERSHIP.—A limited partnership, as defined by the Act of 1907, must consist of one or more persons called general partners, who are liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who on entering into the partnership contribute capital or property valued at a stated amount, and who are not liable for the firm's debts beyond the amount so contributed. A limited partner may not draw out, while the partnership continues, any part of his contribution. If he does, he is liable for the firm's debts up to the amount so drawn out.

In limited partnerships, as in ordinary partnerships, the maximum number of partners in a banking business is ten, and in any other business is twenty.

Every limited partnership must be registered in accordance with the provisions of the Act, and stamp duty and registration fees require to be paid. A statement of particulars signed by the partners must be sent to the Registrar of Joint Stock Companies, who is the Registrar under the Act. Changes in the partnership must also be registered.

A limited partner takes no part in the management,

and has no power to bind the firm; but may inspect the books, examine into the state and prospects of the business, and advise with the partners thereon. If he takes part in the management he is liable for the firm's debts incurred while he does so, as though he were a general partner. He may with consent of the general partners assign his share.

If a general partner becomes a limited partner, or a limited partner assigns his share, notice thereof must be advertised in the *Gazette*.

A limited partnership is not dissolved by the death or bankruptcy of a limited partner, nor is his lunacy a ground of dissolution by the Court, unless his share cannot be otherwise ascertained and realised. A limited partner is not entitled to dissolve the partnership by notice.

In the event of a dissolution the affairs of the partnership are wound up by the general partners unless the Court orders otherwise.

GUARANTY.—A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm (section 18).

PARTNERSHIP PROPERTY (sections 20-22).—This consists of all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the firm's business. It must be held and applied by the partners exclusively for the purposes of the partnership. Property bought with money belonging to the firm is deemed to have been bought on account of the firm.

In the case of land being acquired by a firm, the title

cannot be taken in the name of the firm. It is usually taken in name of the partners, and the survivors or survivor of them, in trust for behoof of the firm. Where land or any heritable interest in land is partnership property it is treated as between the partners as personal or moveable and not heritable estate. Partners during the subsistence of the partnership are not regarded as having an exclusive right to any particular portion of property, but merely a personal claim against the firm for a share of the stock and profits.

DISSOLUTION OF PARTNERSHIP (sections 26, 27, 32-34).—If a partnership has been entered into for an undefined time, it may be terminated at the pleasure of the parties. Any partner may give notice to the others of his intention to dissolve the firm. The notice ought to be in writing, although verbal notice would be sufficient where the partnership is verbal. The firm is dissolved as from the date mentioned in the notice as the date of dissolution, or if no date is so mentioned, as from the date of the communication of the notice.

If the partnership has been for a fixed term, it ends at the expiration of that term. But the partners may carry it on as formerly without a new contract. In that case it is held to be a partnership at will on the old terms, so far as they are applicable.

If the partnership is for a single adventure or undertaking, it is dissolved by the termination of the adventure or undertaking.

Subject to any agreement between the partners, a partnership is dissolved by the death or bankruptcy of a partner. In the latter case sequestration and not mere insolvency or notour bankruptcy is necessary.

If a partner suffers his share to be charged for his separate debt, the firm may be dissolved. But note that in this case dissolution of the firm is at the option of the other partners only.

If any event happens which makes the business of the firm unlawful, it is thereby dissolved.

DISSOLUTION BY COURT (section 35).—In certain cases a partner may apply to the Court for dissolution of his firm. Dissolution may be granted by the Court on the following grounds:—

(1) Where a partner becomes insane or permanently incapable of acting as a partner.

(2) Where a partner has been guilty of conduct calculated to affect the business prejudicially; such as serious crime or habitual drunkenness.

(3) Where a partner wilfully or persistently commits a breach of the partnership agreement, or so conducts himself as to make it not reasonably practicable for the other partners to act with him; for example, owing to eccentricities of temper.

(4) Where the business can only be carried on at a loss.

(5) Where the Court considers a dissolution just and reasonable.

AFTER DISSOLUTION.—After dissolution of the firm, partners are still entitled to act and to bind the firm for the purpose of winding up the partnership affairs and completing transactions begun but unfinished at the date of the dissolution. But the firm is not bound by the acts of a bankrupt partner (section 38).

If partners cannot agree, the Court may appoint a judicial factor to wind up.

PROFITS AFTER DISSOLUTION.—A business is sometimes carried on by the remaining members of a firm without settling up the share of the deceased or retiring partner. In that case he or his representatives have the option of claiming either the share of the profits made since the dissolution by the use of his share of the assets or interest

at 5 per cent. per annum on the amount of his share of the assets (section 42).

FINAL SETTLEMENT (section 44).—The settlement of accounts between partners is generally provided for by the contract of copartnership. Subject to agreement, the following rules apply:—All losses, including loss of capital, are paid first out of profits, next out of capital, and lastly, if necessary, by each partner in the proportion in which he was entitled to share profits.

The assets of the firm are applied (1) in paying the debts and liabilities of the firm to persons who are not partners in it; (2) in paying to each partner advances made by him beyond his share of capital; (3) in repaying to each partner his share of capital; (4) the balance, if any, is divided according to the rights of the partners in the profits.

CHAPTER XV.

COMPANIES.

STATUTES.—The statute law relating to companies has been consolidated by the Companies (Consolidation) Act, 1908, 8 Edw. VII. cap. 69, an Act containing 296 sections and 6 schedules. Before this Act was passed the principal Act dealing with the subject was the Companies Act of 1862. Some sixteen amending Acts had been passed from time to time. These Acts were referred to as the Companies Acts, 1862 to 1907, and have been consolidated by the 1908 Act. A short Act, called the Companies Act, 1913, has been passed amending the provisions of the 1908 Act with respect to private companies. These Acts may be cited together as the Companies Acts, 1908 and 1913. Unless otherwise indicated, the Act referred to in this chapter is the 1908 Act.

WHEN IS INCORPORATION ESSENTIAL?—We have seen (p. 186) that, since 1862, if more than ten persons are to carry on a banking business or more than twenty any other business, partnership is not legal. A company must be formed and registered under the Companies Act. An exception is made in the case of companies formed in pursuance of some other Act of Parliament or of letters patent. Part I. of the Act, consisting of sections 1 to 21, deals with the constitution and incorporation of companies.

NUMBER OF PERSONS REQUIRED.—The number required to form a company is not less than seven, and must never fall below seven (section 2). Where the business is

carried on for six months after the number of members is reduced below seven, every member cognisant of the fact is liable for payment of the whole debts contracted during the period (section 115). The extent of the interest which any individual member may hold is immaterial. Of 20,000 shares, if one man held 19,994 and six friends held 1 each of the 6 remaining shares, there would be sufficient compliance with the Act. (See *Salomon*, 1897, A.C. 22, known as the "one-man company" case.)

In the case of private companies (see *infra*) the number of persons required is only two.

ADVANTAGES OF INCORPORATION.—The limitation of the liability of its members is one of the great privileges and advantages of incorporated companies. Companies may be formed without limited liability, but they are now extremely rare. In the unlimited companies every member is individually liable for the debts of the company to his uttermost farthing, as in an ordinary partnership. Of limited liability companies there are two classes—

(1) Companies limited by shares. In this class, which is by far the most common and the most important, the liability of the individual members is limited to the amount (if any) unpaid on their shares. For example, if the shares are £1 shares, on which 15s. has been paid up, the liability of a member is limited to 5s. on every share he holds, being the amount remaining unpaid. If the shares are £1 shares, fully paid, there is no liability to pay anything more.

(2) Companies limited by guarantee. There are not many of this class. It is a method of incorporation almost exclusively used by clubs and similar associations. Under it each member undertakes to contribute to the assets of the company if it be wound up while he is a member, or within one year afterwards, such amount as may be required, not exceeding a fixed sum, to meet the com-

pany's liabilities contracted before he ceased to be a member.

Besides limited liability, incorporated companies have other important advantages, among which may be mentioned the following:—The death of a member does not interrupt the business or dissolve the company; an interest in the company may, as a rule, be bought and sold with the utmost freedom by the simple method of transferring shares; and there are useful facilities for borrowing money.

MEMORANDUM OF ASSOCIATION (sections 2-9).—In forming a company a document, called the memorandum of association, must be prepared. The memorandum of association is the charter of the company. It must contain, in the case of a company limited by shares, the following particulars:—

1. The name of the proposed company, with the addition of the word “limited” as the last word of the name. *E.g.*, “The name of the company is ‘The Eastern Steam Packet Company, Limited.’”

The name must not be identical with that of any existing company, or so nearly resembling it as to be calculated to deceive. Thus *Madame Tussaud & Sons, Limited*, obtained an injunction restraining the registration of a proposed new company, “*Louis Tussaud, Limited*,” which was promoted for the purpose of carrying on a similar business or exhibition to that of the established company (*Tussaud & Sons*, 1890, 44 Ch.D. 678). This rule applies although the purposes and objects of the two companies are totally different.

The Board of Trade may dispense with the word “limited” if they think proper where the company is not one formed for the purpose of pecuniary gain or profit. The prefix “Royal,” “Imperial,” “Crown,” &c., may not be used without the licence of the Home Secretary.

2. The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situated. *E.g.*, "The registered office of the company will be situate in Scotland."

3. The objects for which the proposed company is formed. The important point about a memorandum is to make it wide enough to cover all the purposes for which the company is formed, because any act which is not within the powers set forth in its memorandum is null and void. A memorandum often specifies trades and businesses which have apparently only a remote connection with the main business of the company, so that it may be possible to extend the business to these without applying to the Court for leave to do so. Until the Memorandum of Association Act, 1890, no company could extend its business without first being wound up and reconstructed. Now, by special resolution and leave of the Court, a change can be effected for certain purposes, viz., (1) to enable the company to carry on its business more economically or more efficiently; or (2) to enable it to attain its main purpose by new or improved means; or (3) to enable it to enlarge or change the local area of its operations; or (4) to enable it to carry on some business that may conveniently or advantageously be combined with its business; or (5) to enable it to restrict or abandon any of the objects specified in its memorandum. It must be shown to the satisfaction of the Court that the alteration is for the benefit of the company, and that the interests of all existing members and creditors are properly safeguarded. To avoid the necessity for this procedure, the greatest care ought to be taken in drawing the memorandum to make it wide enough.

4. A declaration that the liability of the members is limited.

5. The amount of capital with which the company is proposed to be registered, divided into shares of a

certain fixed amount. *E.g.*, "The capital of the company is £100,000, divided into 10,000 shares of £10 each."

There must be no fewer than seven subscribers to the memorandum, which must be signed by each in the presence of, and attested by, one witness at least. No subscriber may take less than one share, and each must write opposite his name the number of shares he takes. The memorandum ends with a declaration in the following terms:—"We, the several persons whose names and addresses are subscribed hereto, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."

In the case of a company limited by guarantee, the memorandum contains the first three requisites, as above, with regard to the name, with addition of the word "limited," the registered office and the objects of the company, and also a declaration as to the extent to which each member undertakes to contribute to the assets in the event of the company being wound up.

The memorandum of an unlimited company merely contains the name of the company, the registered office, and the objects for which it is established.

ARTICLES OF ASSOCIATION (sections 10-13).—The articles of association are the rules to guide the company in the management of its internal affairs. They cannot authorise any act beyond the scope of the memorandum. They are simply the bye-laws for internal government. They deal with and regulate such matters as calls on shares, transfer and transmission of shares, forfeiture of shares, conversion of shares into stock, increase in capital, general meetings, proceedings at general meetings, votes of members, number, powers, and duties of directors, dividends and reserve, accounts, audit, and notices.

In the case of a company limited by shares, the

memorandum may be and usually is accompanied, when registered, by articles of association. If no articles are so registered, the articles in Table A of the 1908 Act are held to be the articles of association of a company registered after the commencement of the Act. The regulations of Table A always apply except in so far as they are expressly excluded by the articles of the company.

In the case of companies unlimited or limited by guarantee the memorandum must, when registered, be accompanied by articles of association.

In the case of private companies (see *infra*) there are certain provisions which must be included in the articles.

Any of the articles of a company may be altered from time to time by a special resolution of the company.

REGISTRATION (sections 14-17).—The company is not in existence until it is registered. The memorandum and articles of association must be sent for registration to the Registrar of Companies in London, Edinburgh, or Dublin, according as the company is an English, Scotch, or Irish company. The Registrar then issues a certificate of incorporation, which is conclusive proof to everybody that the company has been properly incorporated. With the application for registration, there must also be delivered to the Registrar a list of the persons who have consented to become directors of the company (section 72), and a declaration that the statutory requirements as to registration and all matters precedent and incidental thereto have been complied with.

On the issue of this certificate a private company may commence business at once; but a public company cannot do so. The next step in the case of a public company is usually to issue a prospectus inviting the public to apply for shares.

STAMP DUTIES AND REGISTRATION FEES.—The stamp duty on the memorandum of association is 10s., and on

the articles of association 10s. The fees to the Registrar are as follows:—If the nominal capital is £2000 or less, £2; for every additional £1000 from £2000 to £5000, £1; for every additional £1000 from £5000 to £10,000, 5s.; for every additional £1000 after £10,000, 1s.; with a limit of £50 as the maximum fee stamp. A fee of 5s. is also payable on the articles, and 5s. on notice of the registered office being sent to the Registrar. To these has to be added 5s. on every £100 of capital when the statement of nominal capital is sent to the Registrar. Thus, where the nominal capital is £10,000 the duties and fees payable are—Deed stamp on memorandum, 10s.; on articles, 10s.; fee stamp on capital, £6 5s.; on articles, 5s.; notice of office, 5s.; duty on capital, £25—together, £32 15s.

PROMOTERS.—The persons who carry through the preliminary negotiations and do the necessary work to get the company formed are called the promoters. One who is a party to the preparation of the prospectus is a promoter, but a person who merely acts in a professional capacity for persons engaged in procuring the formation of the company is not a promoter (section 84 (5)). Promoters perform very important functions in the initial stages. They have also important duties and liabilities. They stand in a fiduciary relation to the company and to those persons whom they induce to become shareholders. They must accordingly fully and fairly disclose all material facts. They are not allowed to make a profit unless it is disclosed to the company. Thus, £7000 was one-half the profit of the sale of an American mine to a Scottish company. The vendor had agreed before the company was formed to pay this sum to the firm of A B & Co. if they negotiated the sale. A partner of A B & Co. took an active part in the promotion of the company and became a director of it. He never disclosed to the shareholders the agreement between his firm and the vendor.

The Court held that the company was entitled to recover the £7000 from A B & Co. (*Scottish Pacific Coast Mining Company v. Falkner Bell & Co.*, 1888, 15 R. 290).

PROSPECTUS.—The promoters or first directors of a company usually issue a prospectus to make the proposed company known and induce persons to take shares. The prospectus sets out the objects of the company and the prospects of success. It is often extensively advertised in the Press and by circulars. A prospectus is defined by section 285 as meaning “any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company.”

Section 80 provides that every prospectus issued by or on behalf of a company must bear the date of publication, that a copy of the prospectus must be signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, and must be filed with the Registrar on or before the date of its publication. It cannot be issued until it is so filed for registration.

The prospectus is a very important document, and the specific requirements as to its contents are detailed in section 81 of the Act. Amongst other particulars, it must state the contents of the memorandum of association, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; the share qualification, remuneration, and names, addresses, and descriptions of the directors; the minimum subscription on which the directors may proceed to allotment; the number and amount of shares, &c., issued otherwise than for cash; names and addresses of vendors; amount payable as purchase money in cash, shares, or debentures; the amount of commission for subscribing or procuring subscriptions for shares; the estimated amount of preliminary expenses; the amount of

payment to any promoter; dates of and parties to every material contract and a reasonable time and place at which any material contract, or copy thereof, may be inspected; the names and addresses of the auditors (if any); the interest of every director in the promotion of, or property acquired by, the company.

If a person has been induced to take shares by untrue statements or the concealment of material facts in a prospectus, he is entitled to have his name removed from the list of shareholders and to have his money repaid to him by the company. He must, however, make the demand immediately on discovering the misrepresentation or concealment. An alternative remedy is open to him. He may claim damages from the directors of the company and every person who has authorised the issue of the prospectus. If necessary for full indemnity the shareholder may have recourse to both these remedies. Under section 84, which re-enacts the provisions of the Directors' Liability Act, 1890, directors, promoters, and other persons authorising the issue of a prospectus are liable for loss to any person subscribing on the faith of the prospectus, unless they show that they had reasonable ground for believing, and did believe up to the time of allotment, that the statements were true.

STATEMENT IN LIEU OF PROSPECTUS.—When a company (not being a private company as defined by the Act) does not issue a prospectus to the public, it is now obliged by section 82 of the Act to file a statement in lieu of prospectus signed by every director or his agent authorised in writing. This statement must be filed before the company can commence business. The form of the statement is set forth in the second Schedule of the Act. It requires, substantially, the same particulars as those required in the prospectus, the contents of the memorandum, names of signatories thereto, the share

qualification and remuneration of directors being the principal omissions.

ALLOTMENT OF SHARES.—The Act provides (sections 85-88) that no allotment may be made of any share capital of a company offered to the public for subscription unless (*a*) the amount fixed by the memorandum or articles, and named in the prospectus as the minimum subscription, has been subscribed, and the sum payable on application has been paid to and received by the company; or (*b*) if no amount is so fixed and named, the whole amount of the share capital offered for subscription has been subscribed and the application money paid.

The Act makes similar provision for companies not issuing a prospectus, the minimum subscription (if any) being in that case named in the statement in lieu of prospectus. These restrictions do not apply to private companies as defined by the Act.

If, in the case of a company issuing a prospectus, the conditions mentioned above are not complied with within forty days from the issue of the prospectus, the application money must be returned to the applicants. If the money is not repaid within forty-eight days, interest at 5 per cent. is also payable.

An application for shares becomes binding as soon as the allotment has been made and notice of that fact has been communicated to the applicant.

A return of the allotments must be filed with the Registrar within one month. If the return is not made, every officer of the company, who is knowingly a party to the default, is liable to a heavy fine.

UNDERWRITING.—By a contract of underwriting persons agree to take up the whole or a certain proportion of the shares if the public do not apply for them within a certain time. The contract may be made with the company or with the promoters, and its object is to insure the successful

floating of the company. The underwriters receive a commission in respect of the number of shares underwritten. The payment of the commission and the amount of rate per cent. thereof must be authorised by the articles of association and disclosed in the prospectus (section 89).

COMMENCEMENT OF BUSINESS.—Section 87 contains important restrictions as to the commencement of business. A company may not commence business or exercise any borrowing powers unless—

(a) The shares payable entirely in cash have been allotted to the amount of the minimum subscription;

(b) Every director has paid on each share taken by him the amounts payable on application and allotment on the shares offered to the public; and

(c) There has been filed with the Registrar a statutory declaration by the secretary or one of the directors that the aforesaid conditions have been complied with. On the filing of this statutory declaration the Registrar gives a certificate, which is conclusive evidence that the company is entitled to commence business.

Where a company does not issue a prospectus there must also be filed with the Registrar a statement in lieu of prospectus (see *supra*) before the company is entitled to commence business.

If the company commences business in contravention of the foregoing provisions, every person responsible is liable to a fine of £50 a day for the period during which the contravention continues.

DIRECTORS (sections 72-79).—The directors of a company are the persons selected to manage its business for the benefit of the shareholders. The number, powers, necessary qualification, and method of election of the directors are regulated by the articles of association. The first directors are, as a rule, named in the articles.

The Act provides that no one may be appointed a

director by the articles or named in a prospectus or statement in lieu of a prospectus as a director unless, before registration of the articles or publication of the prospectus or filing of the statement, he has, by himself or his agent, authorised in writing, (a) signed and filed with the Registrar a consent in writing to act as a director; (b) either signed the memorandum of association for, or filed with the Registrar a signed contract to take from the company and pay for, the shares which are necessary to qualify him for the position of a director. If a director does not acquire his qualification within two months after his appointment, or within any shorter time fixed by the regulations of the company, or if he subsequently ceases to hold his qualification, he must vacate his office. If he continues to act as director he is liable to pay a fine of £5 for every day during which he so acts.

The directors have the entire management and control of the affairs of the company, and are allowed a wide discretion in conducting the business. Their powers are limited by any restrictions contained in the articles of association. If they enter into any contract which is outside their powers, but within the powers of the company, their actings may be ratified by the shareholders; but if the contract is outside the powers of the company it is void and cannot be ratified. A director is not entitled to make any secret profit in respect of his position. Unless specially authorised by the articles, directors cannot delegate their powers to other persons.

Companies must keep a register of directors or managers, and file copies of the register from time to time with the Registrar.

REGISTER OF MEMBERS (sections 25-32).—Every company must, under penalties, keep a register of its members. The register contains the names and designations of the members, with particulars of the shares held by

each, the dates when names of persons are entered as members, and when any one ceases to be a member.

The register is kept at the registered office of the company, and must be open to the inspection of any member *gratis*, and to the inspection of any other person on payment of a sum not exceeding 1s. On notice being given by newspaper advertisement, it may be closed for any time not exceeding thirty days in each year.

If the name of any person is improperly entered or omitted from the register, summary proceedings may be taken in the Court of Session to have the register rectified. An order of Court to rectify the register must be notified to the Registrar.

Every company having a capital divided into shares must forward a list of its members to the Registrar once at least in every year.

Any person may demand to be supplied with copy of the register or annual list, or any part thereof, on payment of 6d. per 100 words, but is not entitled himself to take extracts and make copies.

SHARE CERTIFICATE.—Every member gets a certificate under the common seal of the company, specifying the shares held by him and the amount paid up thereon. It is generally stated in the articles how the certificate is to be issued, a common provision being that it shall be signed by two directors, countersigned by the secretary, and impressed with the common seal of the company.

The articles usually provide that if a certificate is worn out or lost it may be renewed on payment of a small fee.

REGISTERED OFFICE.—Every company must have a registered office, and notice of its situation must be given to the Registrar (section 62).

COMMON SEAL AND PUBLICATION OF NAME.—One of the effects of registration is that a company shall have a

common seal (section 16 (2)). It is impressed upon all important documents, such as share certificates, debenture bonds, contracts, and the like. Article 76 of Table A requires for its use a resolution of the Board, the presence of two directors and the secretary or other person appointed, who shall sign every instrument to which the seal is affixed in their presence. But the use of the seal may be otherwise regulated by the company's articles.

Section 63 provides that the name of every limited company (*a*) must be painted or affixed on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, and in letters easily legible; (*b*) must be engraved in legible characters on its seal; and (*c*) must be mentioned in legible characters in all notices, advertisements, publications, bills of exchange, cheques, orders, invoices, and receipts, and the like, purporting to be signed by or on behalf of the company. There are statutory penalties attached to the breach of these requirements.

TRANSFER OF SHARES.—Unless restricted by the articles of association, every shareholder may transfer his shares to any one he pleases. To complete the transaction there must be a duly executed transfer, properly stamped, signed by both seller and purchaser, delivery of the certificate, and registration of the transfer. When the transfer is sent to the company for registration the transferor's certificate is usually sent along with it, and a new certificate is thereupon issued in favour of the transferee. The transferee becomes a member of the company upon registration of his name on the register of members. The directors of a going company have no power to refuse to register a transfer unless such power is expressly given to them by the articles.

On the death of a shareholder the right to his shares passes to his executor or personal representative. On

his bankruptcy it passes to his trustee in bankruptcy. Such executor or representative or trustee may transfer the shares without being registered.

MEETINGS AND RESOLUTIONS.—It is provided by section 65 that the first general meeting of every company limited by shares must be held within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business. This is called the “statutory meeting.” The directors must, at least seven days before the date of the meeting, forward to every member a certified report, called “the statutory report,” as to the shares allotted, the cash received in respect of these shares, and the receipts and payments of the company on capital account, &c. They must also file a copy of the report with the Registrar. A list showing the members of the company and the number of shares held by them respectively must be produced at the commencement of the meeting, and remain open and accessible to any member during its continuance. The provisions with regard to the statutory report do not apply to a private company.

For the subsequent general meetings of the company provision is usually made in the articles. Section 64 provides that a general meeting of every company must be held at least once a year, and not more than fifteen months after the holding of the last preceding general meeting. This is called the annual general meeting or the ordinary general meeting. It is held for the purpose of receiving the report of the directors, declaring a dividend, considering the accounts and balance sheet, election of directors and auditors, and dealing with other matters in the ordinary course of the company’s business.

An extraordinary general meeting may be convened by the directors at any time they see fit. Section 66 provides that the directors shall, on the requisition of the holders of not less than one-tenth of the issued capital

upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting. If the directors do not proceed to cause the meeting to be held within twenty-one days, the requisitionists, or a majority in value, may themselves convene the meeting. At these meetings only the special business for which they are convened may be transacted.

Unless otherwise provided in the articles, a meeting may be called on seven days' notice in writing, and five members may call a meeting (section 67).

The ordinary resolutions of the company are usually carried at general meetings by the vote of the majority of those present, either in person or by proxy—a proxy being a written mandate by an absent member authorising another person to vote on his behalf. The articles regulate the procedure in counting the votes. Voting, in the first instance, is taken by a show of hands, each shareholder being entitled to one vote for himself, but none for the persons whose proxies he holds. A poll may then be demanded, when the number of votes members are entitled to may be ascertained and proxies used. A vote for every share is a common provision in articles.

For certain acts of the company an ordinary resolution is not sufficient, and a "special resolution" is necessary. A special resolution has, in the first place, to be passed by a majority of not less than three-fourths of the members present in person or by proxy, and has subsequently to be confirmed by a simple majority at a meeting held not less than fourteen days nor more than one month after the first meeting (section 69). A special resolution is necessary for changing the name of the company, altering the articles, reducing capital, subdividing shares, altering the objects of the memorandum of association, and many other purposes.

An extraordinary resolution has to be passed by a majority of three-fourths of the members present in

person or by proxy, but does not require confirmation at a subsequent meeting (section 69). It is mostly used for a few purposes in connection with the winding up of a company.

A copy of every special and extraordinary resolution must within fifteen days from the confirmation or the passing respectively be printed and forwarded to the Registrar (section 70).

Minutes of all resolutions and proceedings at meetings must be entered in books provided for the purpose, and such minutes, if signed by the chairman of the meeting, or of the next succeeding meeting, are received as evidence in all legal proceedings (section 71).

LIABILITY OF SHAREHOLDERS.—As already mentioned, the liability of a member of a company limited by shares is limited to the amount (if any) unpaid on the shares held by him. When the whole amount of a share has been paid to the company it is said to be “paid up.” The holder of paid-up shares is absolutely free from any further liability. If only a proportion of a share is paid up; the holder is liable for the balance. If the remaining portion or any part of it be required, a demand is made on the shareholder by what is termed a “call.” Thus, in £1 shares, where 10s. has been paid up, a call might be made for the balance of 10s. unpaid, or if 2s. 6d. only were required a call might be made for that amount.

If shares have been transferred more than a year before the call is made, the former shareholder escapes liability. Within the year he may be liable in the event of the company being wound up, but only if the transferee is unable to satisfy the call when made and if the other existing shareholders fail to discharge in full the liabilities of the company.

CAPITAL.—The capital of a company is the sum subscribed by the shareholders for the purposes of the

company's business. The "nominal" capital is the sum stated in the memorandum as the proposed capital. The "subscribed" or "issued" capital is that part of the nominal capital which has been taken up by shareholders. The "paid-up" capital is that part of the subscribed capital which has been paid to the company by the shareholders. Where the subscribed capital is not fully paid up, the remaining portion is called "unpaid" or "uncalled" capital. Thus, where a memorandum states the capital of a company to be £100,000, divided into 10,000 shares of £10 each, and 7500 shares are taken up, on which there is paid only £5 per share, the nominal capital is £100,000, the subscribed or issued capital £75,000, the paid-up capital £37,500, and the unpaid or uncalled capital £37,500.

INCREASE OF CAPITAL.—A company limited by shares may, if authorised by its memorandum or articles of association as originally framed, or as altered by special resolution, increase its nominal capital by the issue of new shares of such amount as the company may think expedient. A notice of the increase and a statement thereof must be registered. In successful companies new shares are frequently issued at a premium, which, as a rule, is carried to the credit of the reserve fund. Neither new nor original shares can be issued at a discount.

REDUCTION OF CAPITAL (sections 46-56).—As the capital is the fund on which the creditors depend for payment of their debts, they are entitled to object to any reduction which would prejudicially affect their interests. A reduction of capital, which must be authorised by the memorandum or articles as originally framed, or as altered by special resolution, is effected by special resolution. It must then have the sanction of the Court. If the reduction of capital does not involve the diminution of liability or the payment to the shareholders of any

paid-up capital, creditors are not entitled to object. If the reduction consists in cancelling shares which have not been taken or agreed to be taken by any person, no sanction of the Court is required. With this exception, the reduction must always be confirmed by an order of Court.

The three principal ways in which capital may be reduced are the following:—(a) By extinguishing or reducing the liability on the shares in respect of share capital not paid up; (b) by cancelling any paid-up share capital which is lost or unrepresented by available assets; (c) by paying off any paid-up capital which is in excess of the wants of the company.

The special resolution, a copy of the order of Court, and a minute approved by the Court giving particulars of the reduced capital must be registered.

Stock.—Paid-up shares are frequently converted into stock. The main difference between shares and stock is that shares must be transferred whole, while stock can be split up into fractional amounts. Thus, the holder of five £100 shares in a company cannot sell £150 worth. If he holds stock of the same amount he can sell £150 or £160 worth. In some companies he could even transfer, say, £299 worth of stock, but others do not permit transfers of a less amount than £10 fractions.

SHARE WARRANT (sections 37 and 38).—By its articles of association a company may be authorised to issue share warrants in respect of paid-up shares or stock. These are instruments under the seal of the company entitling the bearer to the shares or stock mentioned in them, and may provide by coupons or otherwise for the payment of future dividends. They may be transferred by mere delivery. The issue of share warrants is very rare in Scotland.

PREFERENCE SHARES.—It is usual to state in the memorandum of association what shares, if any, are to

have a preference in the distribution of the profits of the company. Such shares are called "preference shares" to distinguish them from what are called "ordinary shares." There are various classes of preference shares. The preference may refer to the profits of each year separately; or it may be "cumulative," in which case the deficiency in one year must be made up in any succeeding year before any dividend is paid to an ordinary shareholder; or the preference may refer both to interest and capital, when in the event of the company being dissolved the holders of preference shares have the first claim on the capital of the company.

FOUNDERS' SHARES.—Founders' shares are frequently issued to the promoters or underwriters, or as a bonus to subscribers for ordinary shares in the proportion of, say, one founders' share for every £1000 of ordinary shares subscribed. They are generally few in number and of small nominal value, and entitle the holders to a proportion (say, one-third) of the profits of the company after a fixed dividend (say, 7 per cent. per annum) has been paid on the ordinary shares. Provision is usually made giving the holders of founders' shares the right to a fixed proportion of the surplus assets in a winding up. It is essential to disclose in the prospectus full particulars as to founders' shares (section 81 (1) (a)).

DEBENTURES.—Besides the capital raised by means of shares, companies frequently raise money by borrowing. The power to do so must be expressly conferred by the memorandum or implied as necessarily incidental to the business of the company. A company may have various ways of borrowing, *e.g.*, by accepting deposits, discounting bills, &c., but the most common method is by the issue of debentures.

Debentures are bonds issued under the seal of the company binding the company to repay the amount lent

at a specified time with interest at a specified rate. They are usually issued for round sums, such as £100, each separate debenture in the series being repayable at the same date, and ranking equally with the others. Debenture holders are thus in the position of creditors of the company, and, if they hold merely the personal obligation of the company for repayment of the money, they are treated in a liquidation just as the other creditors. As a rule, however, debenture holders are secured creditors, some property of the company being conveyed to trustees for their behoof in security of the due repayment of the amount advanced. To give the debenture holders a preference the security must be properly completed in the usual way, *e.g.*, a conveyance of heritable property in security must be duly recorded in the appropriate register.

Unlike shares, debentures may be issued at a discount, *e.g.*, a debenture for £100 may be issued for £95. It is not uncommon to issue debentures at a premium, *e.g.*; £105 may be paid for a debenture of £100.

CONSIDERATION FOR SHARES.—The general rule is that a shareholder must pay for the amount of his shares in cash. In the case of shares allotted in whole or in part for a consideration other than cash, *e.g.*, goods supplied, services rendered, or property transferred, care must be taken to conform to the requirements of the Act, which provides that in such cases the company must, within a month after allotment, file with the Registrar a contract in writing constituting the title of the allottee to such allotment, together with any contract of sale, or for services or other consideration in respect of which such allotment was made. Further, a return must be filed stating the number and the nominal amount of the shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

DIVIDENDS.—Dividends may only be paid out of profits, and cannot be paid out of capital. Neither the memorandum nor articles of association can authorise payment out of capital for this purpose, as such procedure would amount to a reduction of capital not authorised by statute. Directors wilfully paying dividends out of capital are personally liable to replace the amount. Questions of difficulty frequently arise in determining what are the profits out of which dividends may be legitimately paid.

PRIVATE COMPANIES.—A private company is defined by the Act, section 121 (as amended by the 1913 Act), as a company which by its articles—

(a) Restricts the right to transfer its shares;

(b) Limits the number of its members to fifty, exclusive of employees and former employees who were members while in the employment, and have since continued to be members; and

(c) Prohibits any invitation to the public to subscribe for any shares or debentures of the company.

As already mentioned, only two members are required to form a private company.

Private companies do not require to file a statement in lieu of a prospectus, nor to file a balance sheet. They do not require to state a minimum subscription before allotment. They are entitled to commence business immediately after incorporation.

A private company may by passing a special resolution and by filing a statement in lieu of prospectus and the statutory declaration required before commencing business, “turn itself into a public company” (section 121 (2)).

WINDING UP.—In the event of a company becoming insolvent, it is incompetent to proceed by way of sequestration under the Bankruptcy Acts as in the case of an individual. The company falls to be wound up under the special provisions contained in Part IV. of the Act,

sections 122 to 242. These provisions for winding up are not confined to the case of bankruptcy. They are used where the company, though solvent, considers its business ought to come to an end, also where it is desired to amalgamate with another company, or to reconstruct the company itself.

There are three methods of winding up, viz.:—

1. By the Court, which is compulsory or judicial.
2. Voluntarily.
3. Voluntarily under the supervision of the Court.

In the case of insolvency the company is usually wound up either by the first or third of these methods; while the second is employed in cases other than inability to pay debts.

1. WINDING UP BY THE COURT (sections 129-145).

A company may be wound up by the Court in the following circumstances:—

- (1) If it passes a special resolution to that effect.
- (2) If default is made in filing the statutory report or in holding the statutory meeting.
- (3) If it does not commence business within a year from its incorporation, or suspends its business for a whole year.
- (4) If the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven.
- (5) If the company is unable to pay its debts. This is the most common ground for compulsory winding up by the Court. A company is deemed unable to pay its debts (a) if any creditor, whose debt amounts to £50 or more, has served a demand upon the company, requiring payment of the same, and the company neglects for three weeks to settle the claim; (b) if, in Scotland, the induciæ of charge for payment on an extract decree, or an extract registered bond, or extract registered protest have expired without payment being made—a slightly different pro-

vision obtaining in England in accordance with English Court practice; or (c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(6) If the Court is of opinion that it is just and equitable that the company should be wound up. The Court exercised this power in such cases as the following:—Where the subscribed capital had found its way into the hands of the real, though not the ostensible promoters, and the affairs of the company were hopelessly embarrassed by numerous actions brought by shareholders on the ground of fraud; where the company had been formed to work a mine to which no title had been acquired; where a complete deadlock as to the affairs of the company had arisen; where a company was formed to work a patent which never was obtained.

Winding up by the Court proceeds on a petition to the Court of Session presented by the company, or a creditor, or a contributory, or by all or any of them. No contributory can present a petition unless either (1) the members of the company are reduced to less than seven in number, or (2) the shares, or some of them, in respect of which he is a contributory, either were originally allotted to him, or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up, or have devolved upon him through the death of a former holder.

The winding up commences at the date of the presentation of the petition. At any time after presentation of the petition the Court may restrain further proceedings in any action against the company. When the order for winding up has been made, no action may be taken or carried on against the company, except by leave of the Court, and subject to such terms as the Court may impose.

All dispositions of the property of the company and every transfer of shares or alteration in the status of members made between the commencement of the wind-

ing up and the order for winding up are void, unless the Court otherwise orders.

The rules as to equalisation of diligence and ranking of creditors applicable to sequestration in bankruptcy (*q.v.*) are extended to the case of companies being wound up either by or subject to the supervision of the Court.

OFFICIAL LIQUIDATORS.—For the purpose of conducting the proceedings in winding up a company and performing such duties as the Court may impose the Court may appoint a liquidator or liquidators. A liquidator appointed by the Court may resign, or, on cause shown, may be removed by the Court. The remuneration is fixed by the Court. In Scotland he is styled official liquidator of the company. He takes into his custody or control all property and effects to which the company is or appears to be entitled, and performs such duties in reference to the winding up as may be imposed by the Court. He has power, with the sanction of the Court, to bring and defend actions in name and on behalf of the company; to carry on the business so far as may be necessary for its beneficial winding up; to sell the property and effects of the company by public auction or private bargain; and in general to do whatever may be necessary for winding up the affairs of the company and distributing its assets.

A liquidator, whether official or voluntary, stands in a different position from a trustee in bankruptcy. The estate of a bankrupt vests in his trustee, but the estate of a company in liquidation remains vested in the company, and is not transferred to or vested in the liquidator. The liquidator acts as manager or agent, superseding the directors. The company subsists as such till dissolution.

CONTRIBUTORIES (sections 123-128).—If the shares of the company are not fully paid up, and the assets are insufficient to meet all liabilities, the shareholders are called upon to contribute rateably whatever sum is neces-

sary, limited, of course, to the amount unpaid upon each of the shares which he holds.

As soon as possible after making an order for winding up the Court settles a list of contributories. The first list made up and settled is known as the "A list," and contains the names of those who are members of the company at the commencement of the winding up, distinguishing between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable for the debts of others. If the money realised from the calls made on the persons named in the "A list" is not sufficient to meet the debts of the company, a second list, called the "B list," is made up. The "B" list consists of persons who held shares within a year preceding the commencement of the winding up. A person may be put on the "B" list only in the event of there being debts outstanding which were contracted before he ceased to be a member, and his liability is limited to such sum remaining unpaid on the shares as the subsequent holder fails to pay.

DISSOLUTION OF THE COMPANY.—When the affairs of the company have been completely wound up the Court makes an order dissolving the company. The order is reported by the official liquidator to the Registrar, who makes a minute in his books of the dissolution of the company.

2. VOLUNTARY WINDING UP (sections 182-198).

A company may be wound up voluntarily (1) when the period, if any, fixed for its duration by the articles expires, or whenever the event, if any, occurs upon the occurrence of which the articles provide for the company's dissolution, and the company in general meeting has passed a resolution to wind up voluntarily; such an event seldom happens in practice. (2) If it passes a

special resolution (*i.e.*, an extraordinary resolution afterwards confirmed) to wind up voluntarily. (3) If it passes an extraordinary resolution to the effect that it cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up.

The winding up commences at the time of the passing of the resolution, and from that time the company ceases to carry on its business, except in so far as may be required for the beneficial winding up thereof. Notice of the special or extraordinary resolution as regards companies registered in Scotland must be advertised in the *Edinburgh Gazette*.

A voluntary winding up is not a bar to the right of any creditor or contributory to have the company wound up by the Court if the Court is of opinion that his rights will be prejudiced by a voluntary winding up. In directing a company to be wound up by the Court the Court may adopt all or any of the proceedings taken in the course of the voluntary winding up.

LIQUIDATOR IN VOLUNTARY WINDING UP.—A liquidator is appointed by the company in general meeting for the purpose of winding up the affairs of the company and distributing the property. If the resolution to wind up is special he cannot be appointed until after the resolution has been confirmed. He must file notice of his appointment with the Registrar within twenty-one days. He must also, within seven days of his appointment, send notice by post to "all persons who appear to him to be creditors of the company" that a meeting of creditors will be held on a date not less than fourteen days, nor more than twenty-one days after his appointment specifying place and hour. He must advertise the notice in the *Gazette* and in two local newspapers circulating in the district where the registered office or principal place of business of the company is situated. At this meeting the creditors determine whether an application will be made

to the Court for the appointment of any person as liquidator, in place or jointly with the liquidator appointed by the company. If they so resolve, such an application may be made to the Court within fourteen days after the meeting. It is in the discretion of the Court either to order the removal of the original liquidator and to appoint another in his place, or to appoint some one to act with him jointly, or to make such other order as may seem just in the interests of the creditors and contributories.

The liquidator may, without the sanction of the Court, exercise all powers given to the official liquidator (see *supra*). In addition he may settle the list of contributories and make calls upon them to the extent of their liability. He pays the debts of the company and adjusts the rights of the contributories amongst themselves. He has authority to pay the costs incidental to the winding up, including his own remuneration (the amount of which is fixed by the company) out of the assets of the company in priority to all other claims.

As soon as the affairs of the company are fully wound up the liquidator makes up an account showing the manner in which the winding up has been conducted, and calls, by advertisement in the *Edinburgh Gazette*, a general meeting of the company, to which the account is submitted.

DISSOLUTION OF THE COMPANY.—The liquidator then makes a return of the meeting to the Registrar of Companies, and three months after the date of the return the company is deemed to be dissolved.

3. WINDING UP UNDER SUPERVISION (sections 199-204).

When a company is in course of being wound up voluntarily, the Court may make an order directing that the voluntary winding up shall continue, but subject to

the supervision of the Court, upon such terms and subject to such conditions as the Court thinks just. The Court will decline to interfere without cause shown, and will take into account the wishes of the creditors. The order will not, as a rule, be granted at the instance of a contributory, so that the petition is almost invariably presented either by the company itself or by creditors. The effect of the order is to secure all the advantages to be derived from a compulsory winding up, while the liquidator, subject to any restrictions imposed by the Court, is free to exercise his powers as in a voluntary liquidation.

CHAPTER XVI.

BANKRUPTCY.

GENERAL.—For the purposes of the Sale of Goods Act, 1893, a person is deemed insolvent “who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due” (section 62). This is the sense in which the word is commonly used, and defines the state of practical insolvency as opposed to absolute insolvency. Absolute insolvency exists where a man’s assets are not equal in amount to his liabilities. The two states do not necessarily co-exist. A solvent man may be unable to meet claims as they are legally demanded owing to his inability to realise certain of his assets immediately; and an absolutely insolvent man in good credit may be able to carry on business for years in that state. Insolvency is the state of financial embarrassment that precedes bankruptcy. On certain procedure being taken upon insolvency, a debtor is rendered bankrupt.

Notour bankruptcy is an expression peculiar to Scots law, and indicates “insolvency of a public or notorious description.” A notour bankrupt is not only insolvent, but his insolvency has been followed by certain steps of legal procedure prescribed by statute. These steps are detailed in the Bankruptcy (Scotland) Act, 1913, section 5. The most common circumstances whereby notour bankruptcy is constituted are (1) when sequestration is granted on the debtor’s own application, and (2) when insolvency concurs with a duly executed charge for payment under a decree of Court or its equivalent followed by expiry of the days of charge without payment.

A bankrupt's estates may be wound up under the statutory process of sequestration, or they may be wound up voluntarily under a trust deed granted by the debtor for behoof of his creditors.

The main objects of the bankruptcy laws are to preserve the estate of an insolvent or bankrupt for the general body of his creditors, to prevent him from giving away any of his assets to friends or particular creditors, and to provide for the impartial division of the estate among the creditors, and for the subsequent discharge of the debtor.

EFFECTS OF INSOLVENCY.—At common law when a man's assets are less than his liabilities, *i.e.*, when he is in a state of absolute insolvency, he is subject to certain restrictions in dealing with his property. Any gift or donation or gratuitous alienation by such an insolvent person may be set aside or reduced at the instance of any creditor who is prejudiced thereby. But to reduce such a gift it must be shown that the ^{absolutely} debtor was insolvent at the time the gift was made. Where the alienation was made some years prior to the date of challenge it is often extremely difficult to prove insolvency at that date. At common law a fraudulent preference to a creditor may be set aside at the instance of another creditor who is injured thereby, but the latter to succeed must establish (1) that the preference was *voluntarily* offered by the debtor and not under legal compulsion by the creditor; (2) that the debtor was absolutely insolvent at the time the preference was given; and (3) that he (the debtor) was aware of his insolvency. Further, no transaction has been set aside by the Court which has not shown some complicity on the part of the creditor in devising this benefit to himself in preference to the other creditors. Thus, at common law there is considerable difficulty in establishing a case of fraudulent preference to be set aside.

The Act 1621, cap. 18, deals with alienations made by

insolvent persons to any conjunct or confident person. A *conjunct* person is a near relative, for example, parent, child, stepson, brother and sister, uncle and aunt, nephew and niece, brother-in-law, and the term has been held to include persons intending to be married. A *confident* person is one standing in a confidential relation with the insolvent, *e.g.*, law agent, servant, mercantile agent, agent in business. The Act strikes at alienations of property or goods made by the insolvent to conjunct or confident persons "without true, just, and necessary causes, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors." Such a transaction may, under the Act, only be challenged by a prior creditor.

The effect of the statute is that, if it is proved that the debtor is insolvent at the date of the challenge and that the alienation has been made to a conjunct or confident person, the burden of proof then lies with the debtor to show that a just consideration or price was given, or that he was solvent at the time of granting.

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The statute thus makes it much easier to set aside a transaction, in the cases to which it refers, than where the common law alone is applicable.

EFFECTS OF NOTOUR BANKRUPTCY.—The Act of 1696, cap. 5, is very important in still further restricting a debtor in dealing with his estate to the prejudice of the general body of his creditors. This statute declares all voluntary dispositions or conveyances granted by a debtor at or after bankruptcy, or within sixty days prior thereto, in favour of a creditor for his satisfaction or further security in preference to other creditors to be void and null. Here the date of the transaction is of importance. The statute goes back to sixty days before the date of notour bankruptcy, and deals with transactions entered into after that date.

The statute is not intended to interfere with transactions

in the ordinary course of business. All cash or other payments by the bankrupt in the ordinary course of business—such as payment of a bill when it falls due—are not struck at by the Act, although made within the period mentioned. All transactions in the ordinary course of business are unaffected by the Act, nor does it prevent transactions being entered into called *nova debita* (new debts); *e.g.*, one might lend a bankrupt money within the sixty days and, at the same time, take an assignation of his life policy in security—the lending of the money and the giving the security forming parts of the same bargain. Such a security cannot be set aside under the Act. In short, the bankrupt may quite validly conduct business in the ordinary way within the said period. What the statute strikes at is a preference granted within sixty days to a favourite creditor in satisfaction or further security of his debt, *e.g.*, A lends money to B on 1st January without security; B, on 1st May, disposes his house to A in security of the loan, and becomes bankrupt on 1st June. The granting of the security, being within sixty days of bankruptcy, is void under the Act.

In the above illustration, if A, in lending the money to B on 1st January, had stipulated that B would give him security (without specifying what the security was to be), and B had given his house in security on 1st May as above, it has been decided the security is bad. Again, if A, in lending the money, had stipulated that B should, if required, convey his house (specifying it) in security of the loan, and B, on being requested on 1st May, conveyed his house in security to A as above, the Court has held that this transaction also is bad, the reason given being that A left it contingent whether or not he should take the security, and, having done that, his taking the security within the sixty days is struck at by the Act. To take the same illustration once more. If A, in lending the money to B, had bound B to convey his house (specifying it) in security of the loan, and the

security writ in implement of this specific obligation had been completed on 1st May, this deed would be sustained as valid. Here a specific security was bargained for, without condition or contingency.

In this connection it is important to notice that securities must be properly completed by registration, intimation, or delivery, as the case may be, as the date of such completion is reckoned as the date of the transaction.

Another important effect of notour bankruptcy is the equalisation of arrestments and poindings. By section 10 of the 1913 Act arrestments and poindings used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, are ranked *pari passu* as if they had all been used of the same date. A creditor may thus be obliged to share with other creditors estate arrested or poinded by him.

Notour bankruptcy also renders a debtor liable to sequestration at the instance of his creditors (section 11 of the 1913 Act).

SEQUESTRATION.—The sequestration of a bankrupt's estates is the process whereby the bankrupt is judicially divested of his estates, which are placed in the hands of a trustee for behoof of his creditors. One of the great advantages of sequestration is that the procedure is regulated by statute and binding upon all the creditors. The statute now dealing with the subject is the Bankruptcy (Scotland) Act, 1913, 3 & 4 Geo. V. cap. 20. The sections subsequently referred to in this chapter, where not otherwise indicated are sections of this Act.

Sequestration operates as a general diligence in favour of the creditors as a body, and has in consequence important effects in cutting down the prior diligences of individual creditors, especially arrestments and poindings used within sixty days prior to notour bankruptcy (section 10).

How OBTAINED (sections 11, 12, 13, and 16 to 42).—A petition for sequestration may be presented either to the Court of Session or to the Sheriff Court of the county where the debtor has for the year preceding the date of the petition resided or carried on business. If the award is made in the Court of Session all subsequent procedure is remitted to such Sheriff Court as in the whole circumstances may be deemed expedient. The debtor himself may present the petition, with the concurrence of one or more creditors whose debts amount in the aggregate to £50. The debts of concurring creditors must not be contingent. It is not necessary for this purpose that the debtor should be notour bankrupt. Sequestration is at once awarded in such an application, and the debtor is thereby rendered notour bankrupt if not formerly in that position.

The petition for sequestration may be presented by a creditor or creditors qualified as above, provided the debtor be notour bankrupt and have within a year before the date of presentation of the petition resided or had a dwelling-house or place of business in Scotland. If it is a Sheriff Court petition, the debtor must have resided or carried on business for a year in the county. Petitions without the concurrence of the debtor are competent only within four months of notour bankruptcy. On presentation of the petition the Court makes a "first deliverance" ordering intimation to the debtor and advertisement in the *Gazette*, and, on subsequently hearing objections (if any), awards or refuses sequestration. The date of the first deliverance is held to be the date of sequestration, although sequestration be not actually awarded till later.

In the case of a deceased debtor the petition may be presented by (a) a mandatory to whom the deceased had granted a mandate to apply for sequestration, or (b) a creditor or creditors qualified as above. At his death the debtor must have been subject to the jurisdiction of the

Scotch Courts. If the deceased was notour bankrupt at the time of his death, or if his successors concur in the petition or renounce the succession, sequestration at the instance of a creditor or creditors is awarded at once. Otherwise it will not be awarded until six months after the debtor's death. The petition may be presented at any time after the debtor's death.

In all cases the petitioning or concurring creditors must produce with the petition an oath or affidavit to the verity of his debt, and also the account and vouchers of the debt.

RECALL OF SEQUESTRATION (sections 30, 31, 32, and 43).—The deliverance awarding sequestration is not subject to review. But within forty days of the award a petition for recall may be presented by (1) any debtor whose estate has been sequestrated without his consent; (2) the successors of a deceased debtor whose estate has been sequestrated without their consent, unless on the application of a mandatory authorised by the deceased debtor; or (3) any creditor. No petition for recall is competent after the forty days except in the following cases, viz. (1) if the successor of a deceased debtor was edictally cited, the petition for recall is competent at any time before the publication of the advertisement for payment of the first dividend; (2) nine-tenths in number and value of the creditors ranked may apply for recall *at any time*; (3) the Accountant or any one having interest may apply for recall within three months on the special grounds that the majority of the creditors in number and value reside in England or Ireland, and that from the situation of the property the estate ought to be distributed under the laws of England or Ireland.

Pending any petition for recall, and until the sequestration be finally recalled, the proceedings in the sequestration go on as if no such petition had been presented.

ELECTION OF TRUSTEE (sections 63 to 71).—In the deliverance awarding sequestration the Court appoints a meeting of the creditors to be held, specifying the place and time of meeting, for the election of a trustee. The date of meeting must be not earlier than six nor later than twelve days from the date of the *Gazette* notice of sequestration having been awarded. At the meeting the creditors elect a preses and a clerk; every creditor must produce an affidavit or oath as to the verity of his debt with accounts or vouchers necessary to prove the debt.

A creditor may be represented by a mandatory, who may vote in the absence of such creditor, provided he exhibit his mandate. The preses marks the oaths and productions with his initials, and the clerk, in the presence of the meeting, writes the minutes, which are signed by the preses. The election of the trustee is made by the creditors or their mandatories, present and qualified; the person who has most votes in value is elected.

The Act provides that, if requested to do so, the Sheriff shall attend this meeting and preside, the Sheriff-clerk or his depute acting as clerk. But this course is scarcely known in practice.

When the Sheriff is not present at the meeting the preses reports the proceedings to him. If there is no competition or objection the Sheriff declares the person elected to be trustee; if there is competition or objection, after hearing parties he gives his decision. The judgment of the Sheriff as to the election of trustee is final.

Upon the trustee finding caution for his intromissions to the extent of the sum fixed by the creditors at the meeting, and lodging bond of caution with the Sheriff-clerk, the Sheriff confirms his election as trustee, and the Sheriff-clerk issues an act and warrant, which is an effectual title to the trustee to perform the duties imposed upon him, and is evidence of his right and title to the sequestrated estate.

INTERIM PRESERVATION OF ESTATE.—It will be seen that some time must elapse before a trustee can be appointed. Circumstances may arise in which it is desirable to withdraw the estate immediately from the bankrupt's control, and preserve it for the creditors. Accordingly, power is given to the Court to take measures for the preservation of the estate either by the appointment of a judicial factor or otherwise. The Sheriff has power before the election of a trustee to cause the books and papers of the bankrupt to be sealed up and put under safe custody, and to lock up the bankrupt's shop, warehouse, or other repositories, and to keep the keys till a trustee is elected and confirmed. He has also power to grant warrant to take possession of and put under safe custody any bank notes, money, bonds, bills, cheques, or drafts or other moveable property belonging to or in the possession of the debtor; and, if necessary for that purpose to open lockfast places and to search the premises and person of the debtor (sections 14 and 15).

EXTENT AND NATURE OF TRUSTEE'S RIGHT (sections 97 to 102).—Generally speaking, sequestration transfers and vests in the trustee the whole property of the debtor, heritable and moveable, with all right, title, and interest therein. Working tools or implements necessary to the bankrupt for earning a livelihood, being unattachable for debt, do not vest in the trustee.

Any estate acquired by the bankrupt after his sequestration and before his discharge (called *acquirenda*) also falls to the trustee under the sequestration. To complete his title to *acquirenda* the trustee must apply to the Court. It is the bankrupt's duty to notify to the trustee immediately that such estate has been acquired by him.

Property, however, made over to the bankrupt, as an alimentary provision for his maintenance and declared not to be assignable nor subject to the diligence of creditors, does not fall under the sequestration, except

in so far as it exceeds a reasonable provision in his favour. In *Haydon v. Forrest's Trustees*, 1895, 3 S.L.T. 286 (O.H.), a baronet and member of the Scots Bar was allowed £500 a year as a reasonable allowance out of an alimentary provision in his favour, and the excess of the provision was ordered to be paid over to the trustee.

Provision is made in the Act for payment to the trustee of a portion of Government pay, salary, or pension payable to a bankrupt (section 148).

A mere hope of succession, *spes successionis*, not being a vested right, or only becoming a right on the happening of some contingency, did not formerly carry anything to the trustee, unless it actually vested before the bankrupt obtained his discharge. Now, however, under the provisions of the 1913 Act, sequestration transfers to the trustee any non-vested contingent right of succession or interest in property conceived in favour of the bankrupt under a will or testamentary settlement, or marriage contract, or other deed of an irrevocable nature to the same effect as if the bankrupt had executed a duly intimated assignation.

The trustee is said to take the bankrupt's estate *tantum et tale* (i.e., so much and of such kind) as the bankrupt had it. This is a very important rule for the protection of trust funds. It means that the trustee takes the estate subject to any claims or conditions under which the bankrupt held it. If the bankrupt acquired any property through fraud or in a fiduciary capacity, it is not carried by the sequestration. Thus A, a law agent, received £1000 from B to invest, and, not being able to find a security at the time, lodged the money in bank on deposit receipt in his own name. A's estates were thereafter sequestrated. The Court held that the £1000 belonged to B, and did not go to the trustee in A's sequestration. So long as trust funds held by the bankrupt can be traced and separated they do not fall under his sequestration. But, on the other hand, if they are inextricably mixed up

with his own funds, so as to be incapable of identification, they form part of the sequestrated estate, and the beneficiaries of the trust would only have a ranking upon the bankrupt estate for their claims.

The trustee takes the property of the bankrupt subject to such preferable securities as existed at the date of the sequestration.

The trustee may pursue and defend actions in the same way as the bankrupt might have done.

The trustee has the option of adopting or rejecting contracts entered into by the bankrupt. He must make up his mind within a reasonable time. The creditor, in the event of non-implementation of a contract, may rank on the estate for damages. If the trustee adopts a contract, he becomes personally liable for the performance of the obligations under it, although he has a claim of relief against the bankrupt's estate.

DUTIES OF TRUSTEE.—There are many statutory duties to which the trustee must give careful heed, but which are too numerous to mention here. As soon after his appointment as possible he must take possession of the estate, and make up an inventory to be transmitted to the Accountant of Court. He must proceed to manage, realise, and recover the estate, and convert it into money. He must keep a sederunt book and regular accounts. He must lodge all moneys in bank in his own name as trustee, and must not retain more than £50 in cash in his own hands. If he retain any sum in excess of this amount for more than ten days he is liable to pay interest at the rate of 20 per cent. per annum; and, unless the money has been so kept from innocent causes, he may be dismissed from office upon petition to the Court by any creditor, and have no claim to remuneration (sections 76 to 80).

Further, the trustee adjudicates upon all claims lodged, and distributes the divisible fund among the creditors according to their respective rights and preferences.

COMMISSIONERS.—Three commissioners, being creditors or their mandatories, are elected at the meeting for the election of trustee, their election being afterwards confirmed by the Sheriff (section 72).

The concurrence of the commissioners is necessary to enable the trustee to sell heritage or to compromise or refer claims to arbitration. They have also duties as to examining and auditing the trustee's accounts, ascertaining if he has lodged moneys in bank, fixing his commission, deciding as to paying or postponing payment of a dividend, and generally superintending the proceedings of the trustee, and giving advice and assistance relative to the management of the estate.

A commissioner may resign at any time. He may be removed (1) by a majority of the creditors *in value* assembled at any meeting duly called for the purpose; or (2) by the Court, after an unfavourable report on his conduct from the Accountant; or (3) if a mandatory, by recall of his mandate.

TRUSTEE'S REMUNERATION.—The trustee's remuneration or commission is fixed by the commissioners prior to the payment of each dividend. The amount may be appealed to the Accountant, and from him to the Court (sections 121, 122).

REMOVAL, RESIGNATION, AND DISCHARGE OF TRUSTEE.—A majority in number and value of the creditors present at any meeting duly called for the purpose may remove the trustee or accept of his resignation. He cannot in general resign without such consent of the creditors. Provision is also made for the removal of the trustee by the Court on cause shown, on the application of one-fourth of the creditors in value entitled to vote.

Further, the trustee may be removed or censured by the Court (1) on the petition of any creditor or the Accountant on the ground of failure to make the annual

return, or (2) when the Accountant on the complaint of any creditor reports that his duties are not being faithfully and properly performed. He may also be dismissed from office by the Court for retaining more than £50 in cash in his own hands for more than ten days, unless the money has been kept from innocent causes. (See *supra*.)

After a final division of the funds, or the approval of a composition contract, the trustee is entitled to his judicial discharge.

THE BANKRUPT.—At the meeting for election of trustee the bankrupt must produce a full state of his affairs, including a rental of his heritable property (section 77).

The bankrupt must appear for public examination in the Sheriff Court, and must answer all lawful questions relating to his affairs, under pain of imprisonment. The Sheriff may, on the application of the trustee, also order the examination of the bankrupt's wife, servants, law agents, and others who can give information relative to the estate. At the close of his examination, the bankrupt must take the oath prescribed in the Act to the effect that he has made a full disclosure of every particular relating to his affairs (sections 83 to 91).

The bankrupt must give all requisite information and assistance to the trustee, and grant all requisite deeds for the recovery and disposal of the estate.

For non-performance of statutory duties he is liable to apprehension and imprisonment. If guilty of fraud or collusive preference he may forfeit his right to discharge and all benefits under the Act.

The Act provides for an allowance being made to the bankrupt out of the estate under certain conditions (section 74).

STATUTORY MEETINGS OF CREDITORS.—The first meeting of creditors prescribed by statute is held for the election of the trustee and commissioners. The second statutory

meeting is held not sooner than seven nor later than fourteen days after the date of the bankrupt's examination. The circular to creditors intimating the date of examination also gives notice of this meeting. At the meeting the trustee submits a report as to the state of the bankrupt's affairs, and an estimate of what the estate is likely to produce. After hearing the report and the trustee's explanations the creditors may at this or any other meeting give directions for the recovery, management, or disposal of the estate. Additional meetings of creditors may be convened for various purposes, a number of which are mentioned in the statute. The statutory requirements as to advertising such meetings must be carefully observed. Special resolutions frequently require majorities specifically prescribed in the Act.

AFFIDAVIT AND CLAIM.—To entitle a creditor to petition for sequestration, to vote, or to draw a dividend, he must produce an oath or affidavit, and the account and vouchers necessary to prove his oath.

In all these cases the oath or affidavit is the same, with one exception, relative to the valuation of securities held by the creditor. In petitioning for sequestration the creditor only requires to specify his securities and co-obligants, and does not require in stating the amount of his claim to put a value on these and deduct such value from the amount of his debt. In claiming to vote he must deduct the value of all securities held by him, including claims on co-obligants and securities liable in relief to the bankrupt, and vote only in respect of the balance. For ranking purposes he only deducts the value of the securities held by him over the bankrupt's estate.

As a safeguard against under-valuations it is provided that, when the affidavit is used for voting, the trustee may take over the securities at the value put upon them by the creditor, with an addition of 20 per cent., and,

when the affidavit is used for ranking, he may take them over at the specified value without any addition. After the trustee intimates his intention to do so the creditor cannot re-value his security, although a re-valuation is competent before such intimation.

The form of affidavit is not statutory. It states definitely the amount of the debt, and that it is due and resting owing. It is signed by the creditor before a magistrate or justice of peace.

Accounts produced with the affidavit for goods supplied or work done must be detailed. Items such as "To goods" are not sufficient. Debts founded on a written document, such as a bond or bill, must be vouched by production of the document.

RANKING OF CLAIMS.—To enable a creditor to participate in a dividend an affidavit and claim must be lodged at least two months before the time fixed for the payment of such dividend, or, when the time of payment has been accelerated, one month prior thereto. If the claim is not lodged in time for the first dividend, but in time for a subsequent dividend, the creditor will, provided the estate is sufficient, receive an equalising dividend corresponding to the dividend he would have drawn if he had lodged his claim in time for the former dividend.

A creditor is entitled to rank only for principal and interest up to the date of sequestration, and not for any interest accruing thereafter. If the debt is payable after sequestration, interest is deducted from the date of sequestration till the date of payment.

As we have seen, a creditor who holds a security over any part of the bankrupt's estate for his debt must in his affidavit put a value on the security, and deduct it from the amount of his claim. He is entitled to rank only for the balance. Only securities which form part of the bankrupt's estate require to be so deducted.

If the security held by the creditor is collateral, or not

over any part of the bankrupt's estate, he is not bound to deduct its value, although he must mention it in his affidavit. A creditor may have a solvent co-obligant along with the bankrupt, but is not debarred on that account from ranking for the full claim. He cannot, however, in such a case draw more than 20s. in the £ from the combined estates.

The creditor of a bankrupt firm ranks on the firm's estates for a dividend. He also ranks on the individual estates of the partners, after deducting the amount he is entitled to receive out of the firm's estate. The private creditors of a bankrupt partner do not rank on the bankrupt firm's estates.

A creditor who claims a preferential ranking does not require to deduct the value of any security held by him.

DOUBLE RANKING.—The same debt cannot be twice ranked for. If A is cautioner for a debt due by B to a bank, A and the bank cannot both rank on B's estate for the debt. If the bank claims on B's estate, A, although he may have paid the difference between the bank's dividend and the amount guaranteed, cannot rank for the amount so paid. If A had paid to the bank the full amount of the debt, A and not the bank would then rank for the dividend.

PREFERENTIAL CLAIMS.—Deathbed and funeral expenses are paid preferably to all other claims. Wages and salaries are preferential to a certain extent. Farm and domestic servants have a preference for their wages for the term current at the date of sequestration; clerks, shopmen, and servants, for four months; workmen, two months. Imperial taxes and rates imposed by local authorities to the extent of twelve months' arrears come next in order of preference. A landlord's right of hypothec for rent is not affected by the sequestration.

ADJUDICATION ON CLAIMS.—It is part of the trustee's duties to adjudicate upon all claims, and for that purpose he may examine the bankrupt, creditor, or any other person on oath relative to any claim. He pronounces a deliverance in writing on each claim rejecting or admitting or requiring further evidence in support of it. A claim may be ranked as preferable or ordinary or contingent. If he rejects a claim he must state specifically in his deliverance the grounds of such rejection. The trustee's deliverance may be appealed to the Court.

COMPOSITION CONTRACT.—If the creditors, with the sanction of the Court, accept an offer of composition on their debts from the bankrupt or his friends, the sequestration ceases, the bankrupt is reinstated in his estate, and the trustee and bankrupt are discharged. The offer of composition is accompanied by a bond of caution for its payment. The offer must be accepted at duly called meetings of the creditors by specified majorities, and the acceptance must be ratified by the approval of the Court. The acceptance of the composition discharges all the original debts, so that the claims of the creditors are thereby converted into claims for their shares of the composition. Failing payment of the composition, the original claims do not revive (sections 134 to 142).

DEED OF ARRANGEMENT.—The creditors at duly called meetings may, by specified majorities, resolve that the estate may be wound up by a deed of arrangement. The resolution must thereafter be sanctioned by the Court, which must be satisfied that the terms of the deed are reasonable. There is no statutory form of deed. It frequently takes the form of an arrangement for payment of a composition, with or without caution, and a re-investiture of the bankrupt in his estate, or it may be an arrangement whereby the bankrupt, under supervision, may be allowed to realise the estate. Although it may

provide for a composition, the deed has a different effect from a composition contract, as on failure to pay the composition the original debt revives. The deed may make provision for conditional or partial discharge of the bankrupt or for no discharge, there being no statutory provision for discharge under a deed of arrangement (sections 34 to 38).

DISCHARGE OF BANKRUPT (sections 143 to 151).—Apart from composition contract or deed of arrangement, in virtue of which a bankrupt may obtain his discharge, he may apply to the Court for his discharge as follows:—(1) After the second statutory meeting of creditors, if all the creditors concur; (2) six months after the date of sequestration, if a majority in number and four-fifths in value of the creditors concur; (3) twelve months after sequestration, if a majority in number and two-thirds in value concur; (4) eighteen months after sequestration, if a majority in number and value concur; (5) two years after sequestration, without any consent of creditors. A report by the trustee with regard to the bankrupt's conduct must be produced with the application. The Court may refuse the discharge if the bankrupt has fraudulently concealed any part of his estate or wilfully failed to comply with any of his statutory duties. The discharge shall not be granted unless a dividend of 5s. in the £ is paid or secured, or the failure to pay 5s. in the £ has, in the opinion of the Court, arisen from circumstances for which the bankrupt cannot be held responsible.

Any preference or collusive agreement for concurring in, facilitating, or obtaining the bankrupt's discharge is null and void, and serious penalties are incurred by such a transaction. If the bankrupt is concerned in or cognisant of such an arrangement he forfeits all right to a discharge; if his discharge has already been granted, it may be annulled. Any creditor obtaining such prefer-

ence or entering into such collusive transaction is liable not only to forfeit the amount of his debt, but also to pay to the trustee double the amount of the preference or other consideration, the sums recovered being distributed among the other creditors in the sequestration. In an actual case, A, a creditor, was offered £500 by M, a friend of the bankrupt, to agree to a composition. A accepted the offer. The composition was carried through and the bankrupt was discharged. A then sued M for the £500, but could not enforce the bargain, which was declared null and void. A was then sued by another creditor in the sequestration, and had ultimately to pay the amount of his original claim, £2797 17s. 6d., and an additional £1000 (being twice the promised £500), in all, £3797 17s. 6d. (*Thomas v. Sandeman*, 1872, 11 M. 81).

SUMMARY SEQUESTRATION (sections 174 to 177).—When a debtor's assets of every description do not in the aggregate exceed £300 in value, his estate may be wound up under a summary sequestration, a process introduced by the 1913 Act. Formerly small bankrupt estates were realised and distributed under the process of *cessio bonorum*, which is now in force only in cases initiated before 1st January, 1914. The petition for summary sequestration is presented to the Sheriff of any sheriffdom within which the debtor has resided or carried on business during the preceding year. It may be at the instance of the debtor, without the concurrence of any creditor, or, where the debtor is notour bankrupt and within four months of notour bankruptcy, at the instance of one or more creditors, whose claims in the aggregate amount to £10. If the creditor or creditors do not know within which sheriffdom the debtor resided or carried on business during the preceding year, or if the debtor be furth of Scotland, the petition may be presented to the Court of Session in the Bill Chamber. A petition for summary

sequestration is incompetent upon the estate of a deceased debtor.

When the debtor himself presents the petition he must lodge with it in the hands of the Sheriff-clerk a short state of affairs subscribed by himself. On a petition at the instance of a creditor, the first deliverance, in addition to a warrant to cite the debtor, contains an order on him to lodge a short state of affairs, signed by him, in the hands of the clerk within six days. In awarding sequestration the judge may either order that it is to proceed as a summary sequestration, or (if from the fact that the state of affairs lodged by the bankrupt shows that the assets exceed £300 in value, or, for some other reason, he be of opinion that it is not expedient that the sequestration so proceed), he may make no such order. In the latter case the sequestration will proceed as an ordinary sequestration.

In summary sequestrations the procedure by sections 175 and 176 is rendered less formal and more expeditious, but subject to the modifications contained in these sections all the other provisions of the Act apply to summary sequestrations.

FRAUDULENT DEBTORS.—A debtor in a process of sequestration is liable to imprisonment for certain offences detailed in section 178 of the Act. Such offences are— not disclosing his state of affairs fully and truly to the best of his knowledge and belief; not delivering up to the trustee all his property or documents and papers relating to his affairs; concealing part of his property or concealing, destroying, or mutilating documents and papers relating to his affairs, after or within four months before presentation of the petition for sequestration; falsifying books and papers within the same period; pawning, pledging, or disposing of otherwise than in the ordinary way of trade, within the four months above mentioned, property obtained on credit and not paid for;

if the debts exceed £200, failure to keep, for the preceding three years or such less period as he has been in business, such books or accounts as are necessary to exhibit and explain his transactions. In these cases he is guilty of a crime, unless he proves to the satisfaction of the Court that he had no intent to defraud. The following acts are also crimes on the part of the bankrupt:—Failure for a month to inform the trustee of a false claim, which the bankrupt knows or believes to have been made; attempting to account for part of his property by fictitious losses or expense; obtaining property on credit by false representation or other fraud within four months before presentation of the petition and not paying for it; after sequestration or within the preceding four months absconding from Scotland or preparing to abscond to avoid examination or other proceedings, or taking property with him to the value of £20, or failing without reasonable excuse to attend examination; making, when insolvent and with intent to defraud his creditors, any gift, transfer, or charge affecting his property; failure without reasonable excuse to lodge a state of affairs.

It is a crime and an offence for an undischarged bankrupt to obtain credit to the extent of £10 from any person without informing him that he is an undischarged bankrupt (section 182).

EXTRAJUDICIAL SETTLEMENTS.—These are private arrangements entered into between the bankrupt and his creditors. They are entered into to avoid expense and publicity. They usually take the form of a trust deed, or a composition contract.

1. *Trust Deed.*—A debtor may execute a trust deed in favour of a trustee for behoof of his creditors, whereby he hands over his whole estate to the trustee to be realised and distributed equitably among the creditors. The granting of a trust deed is a voluntary act on the part of

the debtor. Being a voluntary arrangement, it requires the consent of all the creditors to make it effective, and one recalcitrant creditor may render the arrangement abortive. Where all the creditors expressly accede to the terms of the trust deed, there is no difficulty—the estate is wound up in accordance with its provisions.

In acceding to a trust deed, it is an implied condition that all the creditors are to be treated on an equal footing without any preference being granted to any one, and that the other creditors will also accede. If any secret payment is made to one creditor to procure his accession, the other creditors may resale. If one creditor refuses to accede, the others are not bound.

At common law a trust deed may be set aside if it give a preference to any individual creditor. It may also be set aside under the Act of 1696, if granted within sixty days of notour bankruptcy. In both these cases a non-acceding creditor may do diligence against the debtor's estate, ignoring the trust deed, and the only way to prevent such a creditor obtaining a preference is to take out sequestration. A trust deed is liable at any time to be superseded by sequestration, unless all the creditors have acceded to the deed.

Unless a creditor has expressly consented to do so in writing, he is not bound to discharge the bankrupt on payment of a dividend or to agree to any other extraordinary conditions that may be contained in the trust deed.

The trust deed usually provides that the rules of ranking in sequestration shall apply. If not, claims are ranked according to the rules of common law, under which creditors will rank for the full amount of their claims without requiring to deduct the value of securities held by them. Farther, such a provision in the deed as to ranking does not bind non-acceding creditors.

A creditor, who does not desire to accede to the trust deed, may intimate his claims to the trustee, and is

entitled to draw a dividend without being bound by the terms of the deed.

Creditors under a trust deed do not require to lodge sworn affidavits relative to their claims. An ordinary statement of claim with production of vouchers is sufficient.

With regard to trust deeds granted after 1st January, 1914, it is provided by section 185 of the 1913 Act that where no provision is made *in gremio* of the deed for the audit of the trustee's accounts and the fixing of his remuneration by a committee of creditors, or where such a committee is not appointed or does not act, the trustee, before making a final division of the estate among the creditors, must submit his accounts to the Accountant of Court, who must audit them and fix the amount of the trustee's remuneration. A trustee, who fails to observe the provisions of this section, forfeits all claim to commission or remuneration.

2. *Composition Contract*.—This is a contract whereby the creditors agree to accept and the debtor to pay a composition on his debts in full discharge of these debts. Under this contract the debtor is not divested of his estate. In the absence of express stipulations to the contrary, it is implied that all creditors are being treated on an equal footing, that they all concur, and that the debtor has fully disclosed the state of his affairs. Unless otherwise stipulated, creditors are entitled to a composition on their full claims without deducting the value of any securities held by them. In a composition contract in a sequestration, on the other hand, it is implied that creditors must deduct the value of securities and obtain a composition only on the balance.

This contract being voluntary, its terms vary according to circumstances. A time limit is usually inserted for obtaining the concurrence of creditors. Security for payment of the composition, as a rule, is provided. A trust deed is sometimes granted to be acted upon on failure

to pay the composition on the specified date. Usually the composition is payable by instalments, bills for these being granted to each creditor. The discharge of the debtor is usually stipulated for on the making of the contract or on payment of the composition.

In the ordinary case failure to pay the composition or an instalment thereof at the due date revives the whole original debt. In this respect it differs from a composition in a sequestration. The terms of the contract, however, may expressly provide otherwise.

CHAPTER XVII.

ARBITRATION.

DEFINITION.—Arbitration is the voluntary submission or reference of a dispute to the decision of a person or persons selected for that purpose. If a question has been referred to arbitration, neither party can raise an action in Court with regard to the same matter. The parties have selected a private judge to decide the question, and must abide by his decision.

CONSTITUTION.—The reference is usually made by a formal probative writing called a deed of submission. No such formality, however, is necessary or usual in referring disputes arising in trade or commerce. In the mercantile world an informal improbative writing is sufficient. Thus, in the case of *Dykes v. Roy*, 1869, 7 M. 357, a dispute between a purchaser and seller as to whether a quantity of seed was conform to sample was referred by informal letters to a merchant in the seed trade. The arbiter issued his decision or award in letters written by his clerk and signed by himself. Both the reference and award, although informal, were held to be binding. Other examples are *Hope v. Crookston*, 1890, 17 R. 868; *Hamlyn & Co. v. Tallisker Distillery Company*, 1894, 21 R. (H.L.) 21; and *Stewart v. Grime*, 1897, 24 R. 414. In matters of small importance a reference may even be made verbally and a written award may follow on a competent verbal reference. But verbal submissions and awards “ought in prudence to be avoided altogether” (Bell on Arbitration).

ANCILLARY SUBMISSION.—In numerous contracts, such as building contracts, contracts for the execution of works, leases, articles of roup, contracts of co-partnership, and contracts of sale of goods, it is a very common practice to insert an arbitration clause. An arbitration so constituted is called an ancillary submission, as the arbitration clause is ancillary to the main purpose of the contract. The clause refers to arbitration disputes arising during the execution of or in connection with the contract. These arbitration clauses have given rise to much litigation, principally on the question whether the particular clause refers to arbitration disputes arising within the duration of the contract only or is wide enough to include disputes arising after the contract has been completed. The tendency of the Court decisions is to construe these clauses strictly, and confine the reference to questions arising during the execution of the contract, unless a wider reference is clearly expressed. “The questions included are questions arising in the course of the execution of the contract, and requiring to be immediately disposed of in order to prevent delay, and consequent loss to one or both parties” (Lord President Inglis in *Beattie v. M'Gregor*, 1883, 10 R. 1094).

If it is intended that every kind of claim arising out of the contract should be referred to arbitration, care should be taken to make the clause wide enough to cover them.

In mercantile contracts (*in re mercatoria*) arbitration clauses are usually quite brief. *E.g.*, “any dispute on this contract to be settled by arbitration here in the usual way.” To these the Court gives as liberal an interpretation as possible.

DURATION.—The arbitration ends with the issue and delivery of the award. If a time is fixed in the deed of submission, the award must be issued within the specified time, otherwise the submission falls. But the parties may homologate an extension. If a blank is left in the

body of the deed for the date within which the arbiters are to decide, it is held that the award must be issued within a year and a day from the date of submission, unless there is in the deed a power of prorogation which has been exercised. When there is no limitation of time and no blank clause applicable to its endurance, an arbitration may continue to exist for forty years. An arbitration, as a rule, falls by the death of either party, but the submission may effectually provide for its continuance in such event.

PROROGATION.—By prorogation an arbitration may be prevented from lapsing and the time for a decision extended. The parties may prorogate as often as they desire, but each prorogation by the parties is practically a new submission. Power to prorogate is frequently given to the arbiters by the parties either in the submission itself or by a separate minute. Without such power, express or implied, arbiters cannot prorogate.

PROCEDURE.—The arbiter regulates the procedure in an arbitration. In formal arbitrations, claims and answers are lodged, and parties and their agents or counsel are heard. If the arbiter hears one party, he cannot refuse to hear the other. An arbiter ought also to allow a proof, if it is essential to the justice of the case. But when the matter is referred to him as a man of skill, he may be justified in refusing to hear evidence. He has almost unlimited discretion as to the nature and extent of the proof. In formal arbitrations it is the almost invariable practice for an arbiter to issue notes of his proposed findings. He is not bound to do so, but it is always proper to issue such notes in order to give parties an opportunity of being heard before the award is finally issued. An arbiter has power to employ expert assistance if necessary. He is also entitled to take legal advice on a point of law. In formal references it is advisable and

usual for the arbiters to appoint a clerk to the submission, whose position is similar to that of a clerk of Court. The clerk to the submission attends to all the procedure in the arbitration, and is usually a law agent. .

ARBITER.—An arbiter (called in England an “arbitrator”) is the judge selected by the parties to decide the dispute or difference between them. A reference to a fluctuating body, such as a Society of Inspectors of Poor, has been held valid (*Bremner v. Elgin Lunacy Board*, 1875, 2 R. (H.L.) 136). An arbiter must be free from bias and have no undisclosed interest in the subject of dispute. A disclosed interest does not disqualify, because the parties are presumed to have taken it into account in making their selection. In contracts for the execution of works, it is common to appoint the engineer or architect as arbiter of disputes arising out of the contract. The contractor makes the contract in the knowledge that the engineer or architect is in the employment of the other party, and thus cannot afterwards object. It has been held in *Buchan v. Melville*, 1902, 4 F. 620, that the appointment of one of the parties to a building contract as arbiter of disputes arising out of the contract was valid and binding.

An arbiter is disqualified from acting if he holds a secret or undisclosed interest, or acquires during the arbitration an interest either direct or indirect in the subject of dispute. Bias also disqualifies; as, where an arbiter wrote to the party nominating him—“You may rest assured that our very utmost will be done on your behalf” (*Pekholtz v. Russell*, 1899 (O.H.), 7 S.L.T. 135).

At common law, an arbiter has no right to remuneration. He may, however, expressly stipulate for a fee before acting. The Courts have recognised an arbiter’s right to a fee, when he is acting professionally. “In accordance with general practice, the rule must now be assumed that a professional man undertaking the duties

of an arbiter is entitled, in the absence of any agreement to the contrary, to be remunerated for his services as arbiter in the same way as he is entitled to receive remuneration for his services in any other professional employment" (Lord Kinnear in *Macintyre Brothers v. Smith*, 1913, S.C. 129).

The Arbitration (Scotland) Act, 1894, provides (section 1) that an agreement to refer to arbitration is not invalid or ineffectual by reason of the reference being to a person not named, or to a person to be named by another person, or to a person merely described as the holder for the time being of any office or appointment. Provision is made by sections 2 and 3 of the Act for the appointment of an arbiter by the Court on the failure of a party to nominate an arbiter or to concur in nominating a single arbiter.

OVERSMAN.—An oversman is the person selected to decide the question at issue in the event of arbiters differing in opinion. In England he is called an "umpire." He may be appointed by the parties in the deed of submission, but more frequently the parties empower the arbiters to nominate an oversman in case of difference between them. Formerly, unless one or other of these courses was followed, the arbitration fell, if the arbiters differed. But the Arbitration Act, 1894, section 4, gives power to the arbiters to nominate an oversman in the event of their differing in opinion, unless the agreement to refer otherwise provides. Should the arbiters fail to agree in nominating an oversman, the Court may do so on the application of any of the parties. In practice an oversman is usually appointed at the outset of the arbitration. He frequently sits along with the arbiters throughout the proceedings and hears the proof. This course, which is quite competent, frequently saves both time and expense. The powers, duties, and disqualifications of an oversman are similar to those of an arbiter.

AWARD OR DECREE-ARBITRAL.—The decision of the arbiter is called an award or decree-arbitral. In formal references the award is formal, being usually holograph or tested. In mercantile references these formalities are not usual or necessary. The award must decide all the questions submitted. It must be (a) delivered to the parties or to the clerk for the purpose of being delivered to the parties, or (b) put on record. It must, as a rule, subject to certain exceptions, be stamped with a 10s. stamp (Revenue Act, 1906).

An arbiter has no power to issue an interim or partial award, unless it is specially conferred on him or necessarily implied from the nature and terms of the submission.

CHALLENGING AWARD.—An award cannot be set aside or reduced on the ground of an error in fact or in law. The arbiter is the judge selected by the parties to settle the merits of the dispute, whether as regards fact or law, and his award must be accepted by the parties as final.

By the 25th enactment of the “Articles of Regulation,” dated in 1695, awards following upon written submissions cannot be reduced except upon the grounds of “corruption, bribery, or falsehood” on the part of the arbiters. In addition to these three grounds, an award may be set aside, if the arbiter goes beyond the scope of the arbitration (*ultra fines compromissi*), or if he disregards any of the express conditions contained in the submission or the principles of justice and fair dealing implied in every submission.

Partial reduction of an award is competent only when the objectionable part is clearly separable from, and does not in any way affect or influence the rest of the award.

JUDICIAL REFERENCE.—Parties to an action in Court may, with consent of the Court, refer the questions at

issue to the decision of an arbiter, usually called a judicial referee. Either the whole cause or a defined part of it may be so referred. This course is usually adopted when the subject-matter of the action is of a technical nature or requires expert or special knowledge or minute investigation for decision. The terms of the reference are set forth in a minute which is lodged in Court by the parties, and to which the Court interpones authority. The Court pronounces decree in terms of the referee's report or award. A judicial referee is entitled to remuneration.

STATUTORY ARBITRATIONS.—Many statutes provide the machinery for the settlement of certain claims and disputes by arbitration. Among statutory arbitrations the most important are those conducted under the provisions contained in the Lands Clauses Consolidation (Scotland) Act, 1845. These provisions are adopted and embodied in the Railways Clauses (Consolidation) Scotland Act, 1845, and are usually incorporated in private Acts promoted by railway companies and others for the compulsory acquisition of lands. They deal with the determination of the compensation payable for lands taken or injuriously affected in connection with the acquisition of lands for railways or other undertakings of a public nature. Mention may also be made of arbitrations under the Agricultural Holdings (Scotland) Act, 1908. (See section 11 and the Second Schedule of the Act and the Rules of 1909 prescribed by the Board of Agriculture.) Provisions are made for referring questions to arbitration in the Acts dealing with building and friendly societies, coal mines regulation, factories and workshops, housing of the working classes, and light railways, and in many other Acts of Parliament.

INDEX.

INDEX.

	PAGE
"A" LIST of contributories, - - - - -	221
Abandonment in marine insurance, - - - - -	127
Acceptance by post, - - - - -	14-18
,, of bill of exchange, - - - - -	137-140
,, ,, general, - - - - -	137
,, ,, qualified, - - - - -	137
,, ,, for honour, - - - - -	148
,, offer and, - - - - -	13-18
,, of goods, - - - - -	72
,, recall of, - - - - -	16-17
Acceptance, timeous, - - - - -	17
Acceptilation, - - - - -	58
Acceptor of bill of exchange, - - - - -	131
Accommodation bill, - - - - -	150
Accounts, prescription of law agents', - - - - -	59
,, ,, shop, - - - - -	59
Acknowledgment of intimation of assignation, - - - - -	51
<i>Acquirenda</i> in sequestration, - - - - -	233
Actual total loss in marine insurance, - - - - -	127
Adhesive stamps, - - - - -	43
Adjudication of claims in sequestration, - - - - -	241
Adjustment of loss in fire insurance, - - - - -	121-123
Adventure, joint, - - - - -	186
Advertisement, offer by, - - - - -	14
Affidavit and claim in sequestration, - - - - -	238, 239
Affreightment, - - - - -	87
Agency, - - - - -	174-182
,, nature of, - - - - -	174
,, constitution of, - - - - -	174, 175
Agent, rights of, against principal, - - - - -	175, 176
,, duties and liabilities of, to principal, - - - - -	176, 177
,, relations between, and third party, - - - - -	177, 178
Agents, kinds of, - - - - -	179-182
,, mercantile, - - - - -	179, 180
,, for foreigners, - - - - -	181, 182
,, <i>del credere</i> , - - - - -	182
Agents' lien or right of retention, - - - - -	175

	PAGE
Agreement, <i>see</i> Contract.	
Allotment of shares, - - - - -	205
Alteration of bill of exchange, - - - - -	151, 152
„ risk in fire insurance, - - - - -	120
Ambiguities in contracts, - - - - -	48
Amendment of specification for patent, - - - - -	103
Ancillary submission, - - - - -	250
Annuity, bond of, - - - - -	163
Arbitration, - - - - -	249-255
„ Constitution, - - - - -	249
„ Definition, - - - - -	249
„ Duration, - - - - -	250
„ Procedure, - - - - -	251
„ Prorogation of, - - - - -	251
Arbitrations, statutory, - - - - -	255
Average loss, general, in marine adventure, - - - - -	127
„ particular, in marine adventure, - - - - -	128
Award, - - - - -	254
„ challenging, - - - - -	254
Arrangement, deed of, - - - - -	241
Articles of association, - - - - -	200
Assignment, bond and, in security, - - - - -	164
„ by death or bankruptcy, - - - - -	53
„ intimation of, - - - - -	50
„ of contracts, - - - - -	49-53
„ of particular kinds of property, - - - - -	52
<i>Assignatus utitur jure auctoris.</i> - - - - -	52
Assignee, - - - - -	50
„ rights of, - - - - -	51
Assignment of patent, - - - - -	105
„ policy of life assurance, - - - - -	116
„ policy, notice of, - - - - -	116
„ policy of marine insurance, - - - - -	128
„ trade mark, - - - - -	110
Association, articles of, - - - - -	200
Assurance, life, <i>see</i> Life Assurance.	
Attested writings, - - - - -	40-42
Attorney, power of, - - - - -	174
Auction, sale by, - - - - -	79
Average clause in fire policy, - - - - -	119
„ policy in fire insurance, - - - - -	119
“B” LIST of contributories, - - - - -	221
Bankrupt, in sequestration, - - - - -	237

	PAGE
Bankrupt, discharge of, in sequestration, - - - - -	242
" " under trust deed, - - - - -	246
Bankruptcy (<i>see</i> also Insolvency, Sequestration, and Trust Deed), - - - - -	225-248
" notour, - - - - -	225
" " effects of, - - - - -	227-229
Bankruptcy (Scotland) Act, 1913, - - - - -	225 <i>et seq.</i>
<i>Beneficium ordinis</i> , - - - - -	166
Bill of exchange, - - - - -	129-155
" acceptance of, - - - - -	137-140
" " general, - - - - -	137
" " qualified, - - - - -	137
" " for honour, - - - - -	148
" acceptor of, - - - - -	131
" accommodation, - - - - -	150
" alteration of, - - - - -	151
" currency, - - - - -	134
" date and place of drawing, - - - - -	133
" date of payment of, - - - - -	132
" days of grace in, - - - - -	134
" definition of, - - - - -	130
" drawee of, - - - - -	131
" drawer of, - - - - -	131
" extinction or discharge of, - - - - -	154
" foreign, - - - - -	134
" forged or unauthorised signatures on, - - - - -	152
" holder of, - - - - -	131
" holder in due course of, - - - - -	141
" indorsation and delivery of - - - - -	131
" indorsee of, - - - - -	131
" indorser of, - - - - -	131
" inland, - - - - -	130
" lost, - - - - -	153
" liabilities of parties on, - - - - -	145
" must be for sum certain in money, - - - - -	133
" must be unconditional, - - - - -	132
" negotiation of, - - - - -	140-142
" notice of dishonour of, - - - - -	143
" noting or protest of, - - - - -	145
" origin and uses of, - - - - -	129
" parole evidence <i>re</i> liability on, - - - - -	150
" parties to, - - - - -	131
" payee of, - - - - -	131
" payment for honour of, - - - - -	149
" place of payment of, - - - - -	133

	PAGE
Bill of exchange, presentment of, for payment, - - -	142
„ referee in case of need in, - - -	148
„ sexennial prescription of, - - -	153
„ stamp duty on, - - -	135
„ summary diligence on, - - -	146
Bills of Exchange Act, 1882, - - -	129 <i>et seq.</i>
Bills of Exchange Act, 1914, - - -	154
Bill of sale of ship, - - -	95
Bills of lading, - - -	51, 68, 90, 91, 129
„ clean, - - -	90
„ form of, - - -	91
„ stamp duty on, - - -	91
„ indorsation and delivery of, - - -	51, 91
Bond, - - -	162-164
„ personal, - - -	162
„ joint, - - -	163
„ of annuity, - - -	163
Bond and assignation in security, - - -	164
„ and disposition in security, - - -	164
Bottomry, - - -	97
Brokers, - - -	180
Buyer of goods, remedies of, - - -	75-78
CAPACITY to buy and sell goods, - - -	61
„ to contract, - - -	19-27
„ of insane persons, - - -	26
„ of intoxicated persons, - - -	26
„ of married women, - - -	21
„ of minors, - - -	19
„ of pupils, - - -	19
Carriage, - - -	82-92
Carrier, common, - - -	82
„ delivery of goods to, - - -	72
„ private or special, - - -	82, 86, 87
Carriers, railway companies as, - - -	85
Cautionary obligations, - - -	165-173
„ „ benefit of discussion, - - -	166
„ „ <i>rei interventus</i> , - - -	165
„ „ representation, - - -	166
„ „ septennial prescription, - - -	172
„ „ stamp duty, - - -	166
Cautioner, discharge of, - - -	171
„ liability of, - - -	168
„ rights of, - - -	168

Cessio, - - - - -	243
Chain Cables and Anchors Act, 1874, - - - - -	66
Charter party, - - - - -	87
,, form of, - - - - -	87
,, stamping, - - - - -	89
Charterer, - - - - -	87
Cheque, - - - - -	155-159
,, crossed, - - - - -	156
,, definition of, - - - - -	155
,, forged, - - - - -	158
,, forged indorsements on, - - - - -	158
,, form of, - - - - -	155
,, presentation of, for payment, - - - - -	156
,, stamp duty on, - - - - -	155
,, when must banker honour, - - - - -	157
Clean bill of lading, - - - - -	90
Co-cautioners, - - - - -	167
Communication, means of, - - - - -	14
Commissioners in sequestration, - - - - -	236
Common carrier, - - - - -	82
Common law, - - - - -	7
Companies, - - - - -	196-224
,, advantages of incorporation, - - - - -	197
,, allotment of shares, - - - - -	205
,, articles of association, - - - - -	200
,, capital, - - - - -	212
,, commencement of business, - - - - -	206
,, common seal and publication of name, - - - - -	208
,, consideration for shares, - - - - -	216
,, debentures, - - - - -	215
,, directors, - - - - -	206
,, dividends, - - - - -	217
,, dissolution, - - - - -	223
,, execution of deed by, - - - - -	40
,, founders' shares, - - - - -	215
,, increase of capital, - - - - -	213
,, meetings and resolutions, - - - - -	210
,, memorandum of association, - - - - -	198
,, number of persons required, - - - - -	196
,, liability of shareholders, - - - - -	212
,, limited by guarantee, - - - - -	197
,, limited by shares, - - - - -	197
,, preference shares, - - - - -	214
,, private, - - - - -	217
,, promoters, - - - - -	202

	PAGE
Companies, prospectus, - - - - -	203
„ reduction of capital, - - - - -	213
„ registration, - - - - -	201
„ register of members, - - - - -	207
„ registered office, - - - - -	208
„ share certificate, - - - - -	208
„ share warrant, - - - - -	214
„ stamp duties and registration fees, - - - - -	201
„ statement in lieu of prospectus, - - - - -	204
„ stock, - - - - -	214
„ transfer of shares, - - - - -	209
„ underwriting, - - - - -	205
„ unlimited, - - - - -	197
„ winding-up, - - - - -	217-224
„ when incorporation essential, - - - - -	196
Companies (Consolidation) Act, 1908, - - - - -	196 <i>et seq.</i>
Compensation, - - - - -	56
Complete specification in patents, - - - - -	100-102
Composition contract in sequestration, - - - - -	241
„ (extrajudicial), - - - - -	247
Compulsory licences of patents, - - - - -	104
Confusion, - - - - -	58
Conjunct and confident person, - - - - -	227
<i>Consensus in idem</i> , - - - - -	13
Construction of contracts, - - - - -	48
Constructive total loss in marine insurance, - - - - -	127
Continuing guarantee, - - - - -	165
„ „ <i>re firm</i> , - - - - -	192
Contracts, - - - - -	13-60
„ ambiguities in, - - - - -	48
„ assignation of, - - - - -	49-53
Contract, by post, - - - - -	14-18
„ capacity to, - - - - -	19-27
„ construction of, - - - - -	48
„ definition of, - - - - -	13
„ delivery of, - - - - -	44
„ extinction of, - - - - -	53-60
„ error in, - - - - -	27
„ facility and circumvention in, - - - - -	31
„ force and fear in, - - - - -	31
„ formalities and evidence of, - - - - -	38-48
„ formation of, - - - - -	13-18
„ fraud in, - - - - -	30
„ illegal and immoral, - - - - -	32-38
„ in restraint of trade, - - - - -	35-38

	PAGE
Contract, misrepresentation in, - - - - -	29
„ stamp duty on, - - - - -	43
„ substance of, - - - - -	18-38
„ undue influence in, - - - - -	31
„ void, - - - - -	18 <i>et seq.</i>
„ voidable, - - - - -	18 <i>et seq.</i>
Contributories in winding up company, - - - - -	220
Copartnership, <i>see</i> Partnership.	
Copyright in designs, - - - - -	106
Crown, effect of patent against, - - - - -	105
Curator, - - - - -	19, 22
<i>Curator bonis</i> to insane person, - - - - -	26
<i>Curator bonis</i> to minor, - - - - -	20
Currency of bills of exchange, - - - - -	134
DAMAGES for non-acceptance of goods, - - - - -	74
„ non-delivery of goods, - - - - -	75
Days of grace, - - - - -	120, 134
Dead freight, - - - - -	87
Death, assignation by, - - - - -	53
Debentures, - - - - -	215
Debtors, fraudulent, - - - - -	244
Decennial prescription, - - - - -	60
Decree-arbitral, - - - - -	254
Deed of arrangement, - - - - -	241
Defects, latent, in goods sold, - - - - -	66
<i>Del credere</i> agents, - - - - -	182
Delegation, - - - - -	58
Delivery of goods, - - - - -	70-72
„ „ at distant place, - - - - -	72
„ „ to carrier, - - - - -	72
„ „ of wrong quantity, - - - - -	71
„ „ instalment, - - - - -	71
Delivery order, <i>see</i> Document of Title to Goods.	
Demurrage, - - - - -	87
Description, goods sold by, - - - - -	65, 66, 67
„ goods sold by sample and, - - - - -	65
Designs, - - - - -	106
„ copyright in, - - - - -	106
„ registration of, - - - - -	107
Diligence, summary, on bills, - - - - -	146
Directors, - - - - -	206
Discharge of bankrupt, in sequestration, - - - - -	242
„ „ under trust deed, - - - - -	246
Discharge of cautioner, - - - - -	171

	PAGE
Dishonour of bill, - - - - -	140, 143
Dissolution of company, - - - - -	223
„ of partnership, - - - - -	193-195
Document of title to goods, - - - - -	51, 70, 179
„ „ „ transfer of, - - - - -	51
Drawee of bill, - - - - -	131
Drawer of bill, - - - - -	131
ENDORSEMENT, <i>see</i> Indorsement.	
Error in contracts, - - - - -	27
Evidence of contracts, - - - - -	38-48
„ parole and written, - - - - -	38
„ parole, in proof of payment, - - - - -	55
„ parole <i>re</i> liability on bills, - - - - -	150
Examination of goods sold, right of, - - - - -	72
Existing goods, - - - - -	62
Extinction of contracts, - - - - -	53-60
„ of bills, - - - - -	154
Extraordinary resolutions of company, - - - - -	211
Extrajudicial settlements, - - - - -	245-248
FACILITY and circumvention, - - - - -	
Factors (Scotland) Act, 1890, - - - - -	179
Factory and commission, - - - - -	174
Fertilisers and Feeding Stuffs Acts, - - - - -	66
Fire insurance, - - - - -	117-123
„ „ adjustments of loss, - - - - -	121
„ „ average clause, - - - - -	119
„ „ days of grace, - - - - -	120
„ „ definition, - - - - -	117
„ „ insurable interest, - - - - -	117
„ „ proposal, - - - - -	118
„ „ risk, - - - - -	121
„ „ tariff and non-tariff companies, - - - - -	123
„ „ varieties of policies: average, floating, specific: valued, - - - - -	119
Firm and firm-name, - - - - -	185
Force and fear, - - - - -	31
Foreign bill, - - - - -	134
Foreigners, agents for, - - - - -	181
Forged bills, - - - - -	152
„ cheques, - - - - -	158
Founders' shares, - - - - -	215
Fraud, - - - - -	30

Fraudulent debtors, - - - - -	244
Fraudulent preferences to creditors, - - - - -	227
Freighter, - - - - -	87
Future goods, - - - - -	62, 67
 Goods, acceptance of, - - - - -	72
,, defined, - - - - -	62
,, delivery of, at distant place, - - - - -	72
,, ,, to carrier, - - - - -	72
,, ,, wrong quantity of, - - - - -	71
,, documents of title to, - - - - -	51, 70, 179
,, existing, - - - - -	62
,, future or unascertained, - - - - -	62, 67
,, instalment deliveries of, - - - - -	71
,, non-acceptance of, - - - - -	74
,, passing off, - - - - -	110
,, payment and delivery of, - - - - -	70
,, price of, - - - - -	63
,, rejection of, - - - - -	76
,, return of rejected, - - - - -	73
,, right of examination of, - - - - -	72
,, rights of unpaid seller against, - - - - -	73
,, seller's lien on, for price, - - - - -	73
,, specific, - - - - -	62, 67
,, stoppage of, <i>in transitu</i> , - - - - -	73
,, transfer of title to, - - - - -	69
Grace, days of, - - - - -	120, 134
Guarantee, <i>see</i> Cautionary Obligations.	
Guarantee against ultimate loss, - - - - -	169
Guarantor, <i>see</i> Cautioner.	
 HIRE purchase, - - - - -	80
Holder of bill, - - - - -	131
,, in due course, - - - - -	141
Holding out as partners, - - - - -	184
Homologation, - - - - -	47
Honour, acceptance for, - - - - -	148
Honour, payment for, - - - - -	149
 ILLEGAL and immoral contracts, - - - - -	32-38
Impossibility of performance, - - - - -	55
Impressed stamps, - - - - -	43
Improvements on patents, - - - - -	99

	PAGE
Incorporation, advantages of, - - - - -	197
„ when essential, - - - - -	196
Increase of capital of company, - - - - -	213
Indorsation of bills of exchange, - - - - -	51, 131
„ of bills of lading, - - - - -	51, 91
Infringement of patent, - - - - -	105
Inland bill, - - - - -	130
Insane persons, - - - - -	26
Insolvency, - - - - -	225
„ effects of, - - - - -	226
Instalment delivery of goods, - - - - -	71
Insurable interest, - - - - -	33
„ fire insurance, - - - - -	117
„ marine insurance, - - - - -	125
„ life assurance, - - - - -	114
Insurance broker, - - - - -	181
Insurance, <i>see</i> Fire Insurance, Marine Insurance, and Life Assurance.	
Intimation of assignation, - - - - -	50
Intoxicated persons, - - - - -	26
JOINT adventure, - - - - -	186
Joint bond, - - - - -	163
Judicial factor in sequestration, - - - - -	233
Judicial reference, - - - - -	254
<i>Jus mariti</i> , - - - - -	21-26
LADING, bill of, <i>see</i> Bills of Lading.	
Land Carriers Act, 1830, - - - - -	84
Latent defects in goods sold, - - - - -	66
Lay-days, - - - - -	87
Lien, agents', - - - - -	175
„ law agents', - - - - -	175
„ seller's for price of goods, - - - - -	73
Life assurance, - - - - -	113-116
„ assignment of policy, - - - - -	116
„ definition, - - - - -	113
„ for benefit of wife and children, - - - - -	115
„ insurable interest, - - - - -	114
„ proposal, - - - - -	113
Limited company, - - - - -	197
Limited partnership, - - - - -	191
Limited Partnership Act, 1907, - - - - -	191
Liquidator, - - - - -	220, 222, 224

	PAGE
<i>Locus pœnitentiæ</i> , - - - - -	45
Lotteries, - - - - -	32
 MARINE insurance, - - - - -	124-128
,, ,, abandonment, - - - - -	127
,, ,, assignment of policy, - - - - -	128
,, ,, disclosure and representation, - - - - -	126
,, ,, insurable interest, - - - - -	125
,, ,, loss—partial, - - - - -	127
,, ,, loss—total, actual, - - - - -	127
,, ,, loss—total, constructive, - - - - -	127
,, ,, policies—valued; open or unvalued; voyage: time; floating, - - - - -	125
,, ,, slip, - - - - -	124
,, ,, underwriters, - - - - -	124
,, ,, warranties, - - - - -	126
Marine Insurance Act, 1906, - - - - -	124
Marks, trade, - - - - -	108-112
Married women, - - - - -	21-26
Memorandum of association, - - - - -	198
Mercantile agents, - - - - -	179
Mercantile Law Amendment (Scotland) Act, 1856, - - - - -	165
Merchandise Marks Acts, - - - - -	111
Merchant shipping, - - - - -	93-97
Merchant Shipping Acts, - - - - -	93
Minors, - - - - -	19
Misrepresentation, - - - - -	29
Mortgage of ship, - - - - -	95
 NAMES, trade, - - - - -	110
Negotiable instruments, - - - - -	52, 141
Negotiation of bills, - - - - -	140-142
Non-acceptance of goods, - - - - -	74
Non-delivery of goods, - - - - -	75
Notarial docquet, - - - - -	42
,, execution of deeds, - - - - -	41-42
,, intimation of assignation, - - - - -	50
Notice of dishonour of bills, - - - - -	143
Noting of bills - - - - -	145
Notour bankruptcy, - - - - -	225
,, effects of, - - - - -	227
Novation, - - - - -	58
 OFFER and acceptance, - - - - -	13-18
,, by advertisement, - - - - -	14

	PAGE
Offer, recall of, - - - - -	16
Oversman, - - - - -	253
 PACTUM <i>de quota litis</i> , - - - - -	 32
Parole evidence, <i>see</i> Evidence.	
Partners, who are, - - - - -	183
,, holding out as, - - - - -	184
,, liability of, - - - - -	190, 191
,, number of, limited, - - - - -	186
,, power of, to bind firm, - - - - -	188
,, relation of, to one another, - - - - -	187
Partnership, - - - - -	183-195
,, constitution, - - - - -	186
,, definition, - - - - -	183
,, dissolution, - - - - -	193-195
,, limited, - - - - -	191
,, property, - - - - -	192
Partnership Act, 1890, - - - - -	183
Patents, - - - - -	98-106
,, amendment of specification, - - - - -	103
,, assignments and licences, - - - - -	105
,, compulsory licences and revocation, - - - - -	104
,, effect of, against Crown, - - - - -	105
,, how to obtain, - - - - -	100
,, improvements, - - - - -	99
,, infringement of, - - - - -	105
,, register of, - - - - -	105
,, restoration of lapsed, - - - - -	103
,, subject-matter, - - - - -	99
,, term of, - - - - -	103
,, who may apply for, - - - - -	100
Patents and Designs Acts, 1907 to 1914, - - - - -	99
Payee of bill, - - - - -	131
Payment, - - - - -	53-55, 63, 64, 70
Payment and delivery of goods, - - - - -	70
Passing of goods, - - - - -	110
Performance, - - - - -	53
Performance, impossibility of, - - - - -	55
Performance. specific, - - - - -	75
Personal bond, - - - - -	162
Pledge of documents of title, - - - - -	180
Policies of Assurance Act, 1867, - - - - -	116
Post, acceptance by, - - - - -	14-18
,, contracts by, - - - - -	14-18
Power of attorney, - - - - -	174
<i>Præposita negotiis domesticis</i> , - - - - -	26

	PAGE
Preference shares, - - - - -	214
Preferences to creditors, fraudulent, - - - - -	227
Preferential claims in sequestration, - - - - -	240
Prescription, - - - - -	58-60
,, decennial, - - - - -	60
,, forty years', - - - - -	60
,, quinquennial, - - - - -	59
,, septennial, - - - - -	60, 172
,, sexennial, - - - - -	60, 153, 161
,, triennial, - - - - -	58
,, vicennial, - - - - -	60
Presentation of bill for payment, - - - - -	142
,, of cheque, - - - - -	156
Prevention of Corruption Act, 1906, - - - - -	177
Price, action for, - - - - -	74
,, of goods, - - - - -	63
,, reserved, - - - - -	80
,, upset, - - - - -	80
Principal, duties of agent to, - - - - -	176
,, rights of agents against, - - - - -	175
Private carrier, - - - - -	82, 86, 87
Private companies, - - - - -	217
Promissory notes, - - - - -	159-161
Promoters of companies, - - - - -	202
Prospectus of companies, - - - - -	203
Protest of bills, - - - - -	145
Pupils, - - - - -	19
 QUALIFIED acceptance of bills, - - - - -	 137
 RAILWAY and Canal Traffic Act, 1854, - - - - -	 85
Railway companies as carriers, - - - - -	82-85
Ranking claims in sequestration, - - - - -	239, 240
Ready money transactions, - - - - -	55
Recall of offer or acceptance, - - - - -	16
,, sequestration, - - - - -	231
Reduction of capital of company, - - - - -	213
Reference, judicial, - - - - -	254
<i>Rei interventus</i> , - - - - -	46, 163
Rejection of goods, - - - - -	76
Release, - - - - -	58
Re-sale, right of, - - - - -	73
Reserved price, - - - - -	80
Resolutions of companies, - - - - -	210
,, extraordinary, - - - - -	211
,, special, - - - - -	211

	PAGE
<i>Respondentia</i> , - - - - -	97
Restraint of trade, contracts in, - - - - -	35-38
Retention, right of, <i>see</i> Lien.	
Return of rejected goods, - - - - -	73
 SALE of Food and Drugs Act, - - - - -	66
Sale by auction, - - - - -	79
Sale of goods, - - - - -	61-81
,, by description, - - - - -	65, 66
,, by sample and description, - - - - -	65
,, by sample, - - - - -	66
,, implied conditions and warranties, - - - - -	64-66
,, risk in, - - - - -	68
Sale of Goods Act, 1893, - - - - -	61 <i>et seq.</i> , 225
Sale on hire-purchase system, - - - - -	80
Sale or return, - - - - -	67
Salvage, - - - - -	96
Sample, sale of goods by, - - - - -	66
Sea carriage, - - - - -	86
Seller of goods, remedies of, - - - - -	74
Sequestration, - - - - -	229-245
,, how obtained, - - - - -	230
,, recall of, - - - - -	231
,, summary, - - - - -	243
,, <i>see</i> Trustee in Sequestration.	
Shares, <i>see</i> Company.	
Share warrant, - - - - -	214
Ship, British, - - - - -	93
,, bill of sale of, - - - - -	95
,, mortgage of, - - - - -	95
,, ownership of, - - - - -	94
,, registration of, - - - - -	93
Shipbroker, - - - - -	180, 181
Shipping, merchant, - - - - -	93-97
Special carrier, - - - - -	82, 86, 87
Specific goods, - - - - -	62, 67
,, performance, - - - - -	75
Specification (in patents), amendment of, - - - - -	103
,, complete, - - - - -	100-102
,, provisional, - - - - -	100-102
Stamp Act, 1891, - - - - -	43
Stamp duty, - - - - -	43
,, bill of exchange, - - - - -	135
,, bill of lading, - - - - -	91
,, cautionary obligations, - - - - -	166
,, charter party, - - - - -	89

	PAGE
Stamp duty, cheque, - - - - -	155
„ on formation of company, - - - - -	201
„ promissory note, - - - - -	160
Stamps, adhesive, - - - - -	43
„ impressed, - - - - -	43
Statement in lieu of prospectus, - - - - -	204
Stock, company, - - - - -	214
Stockbroker, - - - - -	180, 181
Stoppage, <i>in transitu</i> , - - - - -	73, 92
Submission, <i>see</i> Arbitration.	
Submission, ancillary, - - - - -	250
Summary diligence on bills, - - - - -	146
Summary sequestration, - - - - -	243
TESTING clause, - - - - -	40
Timeous acceptance, - - - - -	17
Tippling Act, - - - - -	32
Trade marks, - - - - -	108-112
„ assignment, - - - - -	110
„ definition, - - - - -	108
„ period of protection, - - - - -	110
„ registration, - - - - -	109
Trade Marks Act, 1905, - - - - -	108
Trade names, - - - - -	110
Transfer without deed, - - - - -	51
„ of title to goods, - - - - -	69
Transmission of Moveable Property Act, 1862, - - - - -	50
Truck Acts, - - - - -	32
Trust deed for behoof of creditors, - - - - -	226, 245
Trustee in sequestration, duties of, - - - - -	235
„ „ election, - - - - -	232
„ „ removal, resignation, and discharge, - - - - -	237
„ „ remuneration, - - - - -	236
„ „ rights, - - - - -	233
Tutor, - - - - -	19
ULTIMATE loss, guarantee against, - - - - -	169
Underwriters in marine insurance, - - - - -	124
Underwriting of companies, - - - - -	205
Undue influence, - - - - -	31
Upset price, - - - - -	80
VOID, - - - - -	18 <i>et seq.</i>
Voidable, - - - - -	18 <i>et seq.</i>

	PAGE
WAGERS, - - - - -	34
Warranties, implied, in sale of goods, - - - - -	64
Warranties in marine insurance, - - - - -	126
Whitebonnet, - - - - -	79
Winding-up of company, - - - - -	217-224
" " by the Court, - - - - -	218
" " voluntary, - - - - -	221
" " voluntary under supervision of Court, - - - - -	223
Witnesses to deeds, - - - - -	40
Writings, attested, - - - - -	40
" holograph, - - - - -	42
" improbative, - - - - -	43
" privileged, - - - - -	42
" probative, - - - - -	39-43
Wrong quantity of goods delivered, - - - - -	71









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